TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY AND W. M. FRANCIS, APPELLANTS,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED SEPTEMBER 10, 1936.

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INDEX

	Original	Print
Record from Superior Court of Fulton County	1	1
Petition	1	1
Exhibit "A"—Letter, W. B. Harrison to Marion Smith, September 16, 1935	5	4
Mandamus nisi	7	5
Amendment to petition	8	6
Answer	9	7
Amendment to answer	13	10
Clerk's certificate (omitted in printing)	15	
Bill of exceptions	16	12
Caption	16	12
Judgment	16	12
Assignment of error	17	13
Designation of record	18	14
Certificate to bill of exceptions	18	14
Proceedings in Supreme Court of Georgia	21	15
Stipulation re determination of Court	21	15

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		Page
Judgment	23	16
Order for hearing on motion for rehearing	24	17
Order on rehearing	25	17
Opinion of Court	26	17
Dissenting opinion, Gilbert, J.	59	43
Dissenting opinion, Hutcheson, J.	61	45
Petition for appeal	64	47
Order allowing appeal	68	50
Assignments of error	70	51
Citation and service (omitted in printing)	73	
Bond on appeal (omitted in printing)	75	
Præcipe for transcript of record	127	54
Clerk's certificate (omitted in printing)	132	
Statement of points to be relied upon and designation as to printing record	133	56

[fol. 1]

IN SUPERIOR COURT OF FULTON COUNTY

Petition

The petition of the Hartford Steam Boiler Inspection and Insurance Company, a corporation under the laws of the State of Connecticut, and W. M. Francis of Fulton County, Georgia, respectfully shows:

1. The defendant, William B. Harrison, is Insurance Commissioner of the State of Georgia, and has his official residence in Fulton County, Georgia.

2. Petitioner, The Hartford Steam Boiler Inspection and Insurance Company, is a corporation for the purpose, among others, of writing policies of casualty insurance and duly licensed to transact business as a casualty insurance company under the laws of the State of Georgia, and does and has for many years conducted such business in the State of Georgia.

3. W. M. Francis is a man of character and standing, both moral and financial, and has a wide knowledge of the business, laws and practices governing and relating to casualty insurance, and the business of an agent for the writing of casualty insurance, and possesses all of the qualities and characteristics required for such an agent under the Act of the General Assembly of the State of Georgia, approved March 28, 1935, saving and excepting only that the said W. M. Francis is a salaried employee of petitioner, The Hartford Steam Boiler Inspection and Insurance Company, which latter requirement petitioner denies to be valid and constitutional.

4. On or about the twelfth day of September, 1835, and pursuant to the aforementioned Act of the General Assembly, petitioner, The Hartford Steam Boiler Inspection and Insurance Company, filed with the defendant insurance commissioner a written application to have the said W. M. Francis licensed by the said insurance commissioner as an insurance agent for the writing of casualty insurance in [fol. 2] the State of Georgia, and accompanied said application by a certificate signed by an executive officer of petitioner, The Hartford Steam Boiler Inspection and In-

surance Company, certifying to each and all of the things required to be certified to by Section I of the aforementioned Act. The said application so filed stated therein that the said W. M. Francis was a salaried employee of petitioner, The Hartford Steam Boiler Inspection and Insurance Company, but denied that the portion of the aforementioned Act of the General Assembly which prohibits salaried employees from being licensed was a constitutional or valid provision.

5. On or about the sixteenth day of September, 1935, the defendant insurance commissioner acted upon said application and refused the same, and refused to examine the said W. M. Francis, or to proceed any further with the said matter. The action of the insurance commissioner was based solely on the ground that the said W. M. Francis was a salaried employee, and that under the aforementioned Act of the General Assembly the insurance commissioner was, as he contended, prohibited from issuing the license to a salaried employee.

6. The said insurance commissioner stated that he was entirely satisfied as to the character, standing, responsibility, ability, and knowledge of the said W. M. Francis, and was entirely satisfied in every other respect as to the fitness of the said W. M. Francis, and that he refused the license solely and exclusively for the reason that said W. M. Francis was a salaried employee. Hence, it is not necessary to copy as a part of this petition the application and the certificate accompanying the same. The insurance commissioner's action refusing said license is shown in a letter of September 16 to the attorney for petitioners, a copy of which letter is attached as Exhibit "A" and made a part hereof.

7. Petitioner, The Hartford Steam Boiler Inspection and Insurance Company, is what is known as a stock company and is not a mutual insurance company.

8. Petitioner avers that so much of the Act of the General Assembly approved the twenty-eighth day of March, 1935, [fol. 3] being a part of Section I of said Act, as prohibits a salaried employee of any insurance company doing business in this State other than agents of mutual insurance companies, from acting as a resident agent of such com-

pany, and from being licensed as such by the insurance commissioner, is unconstitutional, void, violative of the constitutional rights of both of the petitioners herein, and has no valid force or effect for the following reasons and in the following respects, to wit:

(a) Said provision of said Act is arbitrary, unreasonable and capricious, and bears no reasonable relationship to the protection of the public or to any other matter or thing within the police power of the State, and deprives both petitioner, The Hartford Steam Boiler Inspection and Insurance Company, as an insurance company, and petitioner, W. M. Francis, as an individual, of their property and of their liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, where it is provided that no state shall deprive any person of liberty or property without due process of law.

(b) Likewise, and for similar reasons, the said provision is violative of Article 1, Section 1, Paragraph 3 of the Constitution of the State of Georgia, wherein it is provided that no person shall be deprived of life or liberty without due process of law.

(c) Said Statute, and the portion thereof heretofore referred to, in discriminating against stock companies and the agents thereof and in favor of mutual companies and the agents thereof, sets up an arbitrary and capricious classification bearing no reasonable relationship to the subject matter of the legislation, and no reasonable relationship to the protection of the public, or any other matter within the legislative authority, and is discriminatory, depriving both petitioners of liberty and property in violation of the constitutional provisions mentioned in the two preceding sub-paragraphs, and, furthermore, denies to each of the petitioners the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States wherein it is provided that no State shall deny to any person within its jurisdiction the equal protection of the law.

[fol. 4] 9. This suit is filed by petitioners to assert their own individual and legal rights as herein set out. They, however, frankly inform the Court that they are acting in

cooperation with the Association of Casualty and Surety Executives to test the constitutionality of the aforesaid law.

Wherefore, your petitioners respectfully pray:

(1) That the Court issue a mandamus nisi directed to the defendant requiring him to proceed to issue a license to your petitioner, W. M. Francis, as an Insurance Agent in Atlanta, Georgia, and directing the defendant to show cause why said mandamus nisi should not be made absolute.

(2) That upon the hearing of said mandamus nisi the same be made absolute, and a mandamus nisi issue against the defendant requiring him to issue said license as aforesaid, and that process do issue as provided by law.

Harold Hirsch & Marion Smith, Attorneys for Petitioners.

[fol. 5] EXHIBIT "A" TO PETITION

Insurance Department

State of Georgia

Atlanta

W. B. Harrison, Commissioner.
Mary M. Nagle, Tax and License Clerk.
A. R. Wright, Deputy Commissioner.

September 16, 1935.

Hon. Marion Smith, Hurt Building, Atlanta, Georgia.

DEAR MR. SMITH:

I have your communication of September 12th inclosing the application of the Hartford Steam Boiler Inspection & Insurance Company for a license for Mr. W. M. Francis as an insurance agent.

The application is accompanied by the certificate of the secretary of the Company which meets the requirements of the Act of the General Assembly approved March 28, 1935. The application for a license is submitted pursuant to that Act.

Mr. Francis has heretofore been licensed as an insurance agent in this State and it would not, therefore, be necessary

for him to submit to the examination required by Section 56-5508 (a) of the Code of 1933, as amended by said Act of 1935, since he is not a first time applicant. I am personally acquainted with Mr. Francis and know that his character, ability and experience are such as to qualify him to carry on the business of an insurance agent under said Act of 1935. It would not be necessary, therefore, to require him to submit to the examination which the insurance commissioner, if he deems necessary, may require of applicants for renewal of licenses.

It appears from the application and from the letter of transmission, that Mr. Francis is a salaried employee of the Hartford Steam Boiler Inspection and Insurance Company. [fol. 6] This being true, under the terms of the Act of 1935, Mr. Francis can not qualify as a resident agent, since the Act expressly provides that the words "resident agent" "shall not include any salaried employee of any insurance company doing business in this State."

For the reason just stated, and for that reason alone, I must decline to consider the application of Mr. Francis and must decline to grant him a license.

Yours very truly, (Signed) W. B. Harrison, Commissioner.

WBH/nc.
(Copy.)

Duly sworn to by W. M. Francis. Jurat omitted in printing.

[fol. 7] In Superior Court of Fulton County

The Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, Plaintiffs,

v.

W. B. Harrison, Insurance Commissioner, Defendant

Mandamus Nisi—Filed September 21, 1935

The foregoing petition read and considered.
Let the same be filed and together with a copy of this mandamus nisi be served on the defendant.

Let the defendant show cause before the Judge hearing motions in this Court on the 5 day of October, 1935, at 9:30 A. M., or at such other time — this Court may hereafter assign, why he should not be required to issue a license to W. M. Francis as a causualty insurance agent in Atlanta, Georgia, as herein prayed.

A mandamus nisi to that effect is now issued and, unless cause to the contrary is shown, the defendant is ordered and required to issue said license.

This 21 day of September, 1935.

John D. Humphries, Judge, Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 8] In Supreme Court of Fulton County

[Title omitted]

Amendment to Petition—Filed Nov. 7, 1935

Come now the petitioners in the above entitled cause, and with leave of the court first obtained, file this, their amendment to said petition as follows:

Paragraph Eight of said petition is amended by adding subparagraph (d) to read as follows:

Said provision of said act is arbitrary, unreasonable and capricious, and bears no reasonable relationship to the protection of the public or to any other matter or thing within the police power of the State, and denies both to petitioner, The Hartford Steam Boiler Inspection & Insurance Company, as an insurance company, and to petitioner, W. M. Francis, as an individual, impartial and complete protection to person and property in violation of Article 1, Section 1, Paragraph II, of the Constitution of the State of Georgia, wherein it is provided "Protection to person and property is the paramount duty of Government, and shall be impartial and complete."

Harold Hirsch & Marion Smith, Hamilton Lokey, Attorneys for Petitioners.

Order

The above and foregoing amendment read and considered. Said amendment is allowed and ordered filed subject to demurrer. This 7th day of November, 1935.

John D. Humphries, Judge, S. C. A. C.

[File endorsement omitted.]

[fol. 9] In Superior Court of Fulton County

[Title omitted]

Answer—Filed November 7, 1935

Now comes the defendant in the above stated case and files this answer to the petition of the palintiff, and for answer says:

1

The allegations of Paragraphs 1, 2, 3, 4, 5, 6, and 7, of the petition are admitted.

2

Paragraph 8 of the petition is denied.

3

Paragraph 9 of the petition is merely declaratory and requires no answer.

4

Pleading further this defendant shows that there is a distinct and well recognized difference between stock insurance companies such as the plaintiff company, and mutual insurance companies. In the case of stock insurance companies the relationship between the company and its policy holders is one of contract merely, and they deal at arm lengths, whereas, in the case of mutual insurance companies, the policy holders are the owners of the company and constitute its stockholders. An agent of a stock company is an employee of the company, although he is under a duty to his customers or prospective customers, and a

relationship of trust or confidence exists between them. An agent of a mutual insurance company is under a special relationship of trust or confidence with its policy holders and prospective policy holders, for the reason that such policy holders are the stockholders and owners of the company, and the agent is in fact their employee and is interested in protecting their rights as well as the rights of the company. In the case of a stock company, the policy [fol. 10] holder has no interest in the profits of the company but is under contract obligation to pay an agreed premium irrespective of the cost of carrying his insurance; the profits belong exclusively to the corporation, and losses insured against are not distributed among the policy holders but fall directly upon the company itself. In the case of a mutual company each policy holder is in fact also an insurer and interested in the profits and liable for the losses. The relationship betwen the poilcy holders is in fact that of partners, although they are governed by the terms of the charter where the company is incorporated. Thus in the case of a mutual company any loss insured against which may be sustained by a policy holder is distributed among all the policy holders in proportion to the insurance carried by each; whatever amount the policy holder may deposit as a premium is returned to him in the form of a dividend on his policy, after deducting his pro rata share of the loss insured against and the expense of doing business. In the case of a stock company the policy holder has no further interest in the premium but it belongs unconditionally to the company.

5

Defendant further shows that there are distinct and radical differences between the methods of doing business employed by stock insurance companies and those employed by mutual insurance companies. Mutual fire and casualty insurance companies, such as those referred to in the Act complained of, do not transact business or write policies through agents who work on a commission basis. All of the contracts of such companies are negotiated by salaried employees. This method of doing business is adopted, as defendant is informed and believes, in order to reduce the expenses of operation and thus benefit the policy holders themselves. On the other hand, stock companies

generally carry on their business and negotiate their contracts exclusively through agents who work on a commission basis. Such agents are the only agents who are held out by stock companies to the public generally as the persons through whom they expect to do business.

Defendant says that substantially 95% of the fire and casualty insurance written on risks located in the State of Georgia by stock insurance companies is written by agents [fol. 11] working on a commission basis. The only cases in which such companies have policies signed by salaried employees are cases where the contract is negotiated outside of the State of Georgia and it is necessary to the validity of the contract that it be countersigned by a resident agent. In those cases stock companies follow the practice of having such policies signed by a salaried employee, who in many cases is a mere clerk, and is not held to the public generally as an agent and has no authority to contract on behalf of the company. Defendant avers, on information and belief, that this is the purposes for which the plaintiffs here desire a license for the plaintiff Francis.

Defendant further shows to the Court that it is his duty as insurance Commisisoner of Georgia to collect the gross premium taxes imposed by the Georgia law on premiums earned in this State by insurance companies. In order to collect this tax it is necessary for defendant to have access to the local agency records of insurance companies. Defendant says that where a stock company follows the practice just outlined above, it is impossible for him to verify the returns made for the assessment of premium taxes, for the reason that in these cases the premium account is carried in the office or agency of the company at which the contract was actually negotiated and not in the office occupied by the resident of Georgia who countersigns the policy.

Defendant says that the facts just narrated constitute the evil at which the General Assembly aimed in the passage of the Act now under consideration.

Defendant further says that the facts just narrated do not generally apply to mutual insurance companies which actually negotiate their contracts relating to Georgia risks through salaried employees located in this State, and keep in this State records available to this defendant for use in verifying their premium tax returns.

Defendants show that the distinctions and differences herein pointed out, and other distinctions and differences which exist as a matter of common knowledge, and which [fol. 12] are within the judicial knowledge of the Court, between stock insurance companies and mutual insurance companies have been repeatedly recognized by legislative enactments of the General Assembly of Georgia. Defendant says that these distinctions and differences afford a reasonable basis for the classification made by the General Assembly in the Act complained of; that such classification is not arbitrary or unreasonable and does not discriminate unlawfully or unconstitutionally against the plaintiffs or either of them. Defendant says that said Act of 1935 constitutes a valid exercise of the police power of the State.

Wherefore, having fully answered, defendant prays to be discharged with his reasonable costs and of this he puts himself upon the court and country.

M. J. Yeomans, Attorney General of Georgia. B. D. Murphy, Assistant Attorney General. —— ——, Assistant Attorney General.

Duly sworn to by Wm. B. Harrison. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 13] In Superior Court of Fulton County

[Title omitted]

Amendment to Answer—Filed November 7, 1935

Now comes the defendant in the above stated case, and by leave of the court, amends his answer heretofore filed, and for amendment says:

1. Defendant shows that while the agents of stock insurance companies dealt with in the Act of the General Assembly complained of in this case are employees of the insurance company in the sense that they operate under contracts with insurance companies, as a matter of fact most,

if not all, of them exercise an independent business in that they solicit and write fire and casualty insurance, and negotiate surety contracts, without any reference to the insurance company in which such risk is to be placed. Such agents have established lines of patronage, and established clienteles, composed of customers who place their insurance business with such agents, leaving to the discretion of the agent the company in which the risk is to be written. It frequently happens that the holder of a policy of fire insurance, or casualty insurance, or the principal in a surety bond, actually does not know the name of the company in which he is insured, but simply deals with the agent because of his confidence in the integrity and established reputation of the agent. The great majority of all the insurance business of such character written in this State is written on the basis just referred to. For these reasons, defendant says that the method by which the agents of such insurance companies are compensated is a matter of public concern, and the public is interested in insuring the fidelity of insurance agents to the trust and confidence imposed in them by the public. The business of such agents is dependent almost wholly upon their maintaining the good will of their customers, and it is a matter of public concern that their fidelity to the trust imposed in them be [fol. 14] insured by the method adopted by the Act complained of, and the fact that infidelity to such trust will result in a decrease in the earnings of such insurance agents insures such action on the part of insurance agents as will best serve the interests of their customers. The facts just narrated constitute a reasonable basis for the classification made by the General Assembly, since no such state of facts exists where insurance contracts are negotiated through agents compensated on a salary basis.

Wherefore, defendant prays that this amendment be allowed and ordered filed.

M. J. Yeomans, Attorney General of Ga. B. D. Murphy, Assistant Atty. Gen.

The foregoing amendment allowed and ordered filed this Nov. 7, 1935.

John D. Humphries, Judge, S. C. A. C.

[File endorsement omitted.]

[fol. 15] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 16] In Superior Court of Fulton County

Bill of Exceptions—Filed November 18, 1935

Be it Remembered That on the 8th day of November, 1935, there came on to be heard in the Superior Court of said County, before Honorable John D. Humphries, Judge of said Court, then and there presiding, the case of The Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, against William B. Harrison, Insurance Commissioner of the State of Georgia, the same being a petition for mandamus absolute to compel the issuance to the said W. M. Francis of a license as a resident agent of the said The Hartford Steam Boiler Inspection and Insurance Company under the Act of the General Assembly approved March 28, 1935.

Be it Further Remembered That at said hearing the petitioners amended their petition; the defendant presented his answer, which was amended at said hearing, and after argument of counsel the Court entered the following order and judgment:

Judgment

"This case coming on for hearing, and after argument of counsel, it is the opinion of this court that the classification made in this act between salaried agents and commissioned agents of insurance companies is arbitrary and unreasonable and bears no proper relationship to the protection of the public or to any other matter or thing within the police power of the State, is discriminatory and deprives both petitioner, The Hartford Steam Boiler Inspection and Insurance Company, as an insurance company, and petitioner, W. M. Francis, as an individual, of their constitutional rights as pointed out in the petition.

"The court is further of the opinion that said act, in discriminating against stock companies and the agents thereof, and in favor of mutual companies and the agents thereof, sets up an arbitrary classification bearing no reasonable relationship to the subject-matter of the legislation, and is

[fol. 17] discriminatory, depriving both petitioner, The Hartford Steam Boiler Inspection and Insurance Company, as an insurance company, and petitioner, W. M. Francis, as an individual, of their constitutional rights as pointed out in said petition.

"Being of the opinion aforesaid, it is adjudged that the act, in so far as it prohibits a salaried agent of a stock company from being licensed as a resident agent, is unconstitutional and void.

"It is Therefore Considered Ordered and Adjudged, that the mandamus is made absolute in this case, and the Insurance Commissioner is ordered, directed, and mandamused to issue a license to W. M. Francis as in said petition prayed.

"This the 8th day of November, 1935.

John D. Humphries, Judge S. C. A. C."

Assignment of Error

To this ruling, order and judgment of the Court the defendant William B. Harrison as Insurance Commissioner of the State of Georgia then and there excepted and here and now excepts and now assigns the same as error and says that said ruling and judgment of the Court was contrary to law, and contrary to the principles of equity and justice, and that the court erred in making said mandamus absolute and in not denying a mandamus absolute upon each and every ground set forth by the petition; and that the Court erred in ruling and holding said Act of the General Assembly herein referred to, to be unconstitutional, upon each of the grounds set forth in the petition, and referred to in said order and judgment and that the Court erred in not holding said Act to be constitutional and valid as against each of the attacks made thereon. The defendant, William B. Harrison, as Insurance Commissioner of the State of Georgia, names himself as plaintiff in error in this bill of exceptions and The Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis as defendants in error in this bill of exceptions.

[fol. 18] DESIGNATION OF RECORD

The plaintiff in error specifies as material to a clear understanding of the errors complained of the following portions of the Record, to wit:

1. The petition, omitting process and service.

2. The amendment to the petition allowed on the 8th day of November, 1935.

3. The answer of the defendant and the amendment thereto allowed on the 8th day of November, 1935.

And now comes William B. Harrison, Insurance Commissioner of the State of Georgia, plaintiff in error in this bill of exceptions, within the time provided by law, and within twenty days from the date of said order and judgment of the Court, and assigning error on all the rulings complained of as being contrary to law, tenders this his bill of exceptions and prays that the same may be certified as true and correct and transmitted to the Supreme Court of Georgia in order that the errors complained of may be considered and corrected.

The Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction of this writ of error for the reason that said case involves the constitutionality of the Act of the General Assembly approved March 28, 1935, and was and is a mandamus proceeding involving an extraordinary judicial remedy.

M. J. Yeomans, Attorney General of Georgia; B. D. Murphy, Assistant Attorney General, Attorneys for Plaintiff in Error.

CERTIFICATE

I do certify that the foregoing bill of exceptions is true, and contains and specifies all of the Record material to a clear understanding of the errors complained of; and the clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the Record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Supreme Court, that

[fols. 19 & 20] the errors alleged to have been committed may be considered and corrected.

This the 18th day of November, 1935.

John D. Humphries, Judge Superior Court Fulton County.

165-330.

Due and legal service of the within bill of exceptions acknowledged; copy received; all other and further notice and service waived.

This the 18th day of November, 1935.

Harold Hirsch & Marion Smith, Counsel for Defendants in Error.

[File endorsements omitted.]

[fol. 21] IN SUPREME COURT OF GEORGIA

No. 11191

WILLIAM B. HARRISON, Insurance Commissioner,

v.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, et al.

STIPULATION RE DETERMINATION OF COURT—Filed July 29, 1936

It is stipulated between counsel for the plaintiff in error and counsel for the defendants in error as follows:

1. The sole question involved in the litigation in this case is the constitutionality of the statute described in the pleadings.

2. Hence the determination of the court with regard to the constitutionality of the statute will finally dispose of the whole case and the whole subject matter of the litigation.

3. It is therefore agreed that in the event of a reversal of the judgment accompanied by an opinion holding the said statute valid the said judgment of reversal shall be and

shall be treated as a final disposition of the case. And without further resistance from either party the superior court of Fulton county shall enter a judgment making the judgment of the Supreme Court the judgment of the superior court.

4. In the event of an affirmance no further judgment or action shall be necessary in the superior court.

5. Nothing in this agreement shall be held to be a waiver of the right of either party to apply for a review in the Supreme Court of the United States by appeal or petition for writ of certiorari as such party may be advised. This the 15th day of July, 1936.

M. J. Yeomans, Attorney General of Georgia; B. D. Murphy, Assistant Attorney General, Counsel for the Plaintiff in Error. Harold Hirsch, Marion Smith, Counsel for the Defendants in Error.

[fol. 22] [File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF GEORGIA

11191

W. B. HARRISON, Insurance Commissioner, etc.,

v.

HARTFORD STEAM BOILER INSPECTION & INS. Co. et al.

JUDGMENT—June 13, 1936

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in making the mandamus absolute, and in requiring the insurance commissioner to issue a license contrary to the provisions of the Act of 1935. All the Justices concur, except Gilbert and Hutcheson, JJ., who dissent.

[fol. 24] IN SUPREME COURT OF GEORGIA

11191

[Title omitted]

ORDER FOR HEARING—July 17, 1936

Upon consideration of the motion for a rehearing filed in this case, it is ordered that the parties be heard upon all questions presented in the motion, by briefs alone. Such briefs shall be filed with the clerk of this court by nine o'clock a. m. of Wednesday, June 22, 1936. Thereby let counsel for the plaintiff in error show cause, in writing, why the judgment of this court of June 13, 1936, should not be vacated.

Let a copy of this order be mailed to counsel for each side.

[fol. 25] IN SUPREME COURT OF GEORGIA

11191

[Title omitted]

ORDER ON REHEARING—July 28, 1936

Upon consideration of this case after a rehearing, it is ordered that the judgment therein rendered by this court on June 13, 1936, be hereby adhered to. Hutcheson, J., dissents from this order.

[fol. 26] IN SUPREME COURT OF GEORGIA

Case No. 11191

HARRISON, Insurance Commissioner,

v.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY et al.

OPINION—June 13, 1936

By the Court:

1. Courts cannot lightly declare an act of the General Assembly unconstitutional, for every presumption is in

favor of the constitutionality of the acts of the legislative department of the State government, and it is a fixed rule that if there should be a doubt upon the subject the doubt must be resolved in favor of the constitutionality of the act.

2. It is not to be denied that there is a limit to the power of classification beyond which the State of Georgia cannot go. A mere difference in the nature or character of the businesses sought to be regulated by legislative enactment will not be sufficient to justify classification of such businesses into different classes.

3. Where the business is affected with a great public interest in which all the citizens of the State are concerned, and injury will result to the general public unless regulatory control be applied, a right of classification arises on behalf of the general public.

4. The State of Georgia has an inherent, sovereign right to reasonably and properly classify all businesses carried on within its borders.

5. That which a State may do with corporations of its own creation it may do with foreign corporations admitted into it.

(a) The State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their rela- [fol. 27] tions. It suffices if it is practical, and is not reviewable unless palpably arbitrary.

6. In German Alliance Insurance Co. v. Lewis, 233 U. S. 389, and in other cases, the Supreme Court of the United States has held that the business of insurance is so far affected with a public interest as to justify legislative regulation. It is within the power of the legislature to regulate the personal contracts involved in such business. It is the business that is the fundamental thing; property is but the instrument of such business.

"A business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation, and the business of insurance falls within this principle. That which makes for the general welfare is a matter of legislative judgment,

and judicial review is limited to power and excludes policy. The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. If the legislature has the power to enact discriminatory legislation, the discrimination is not invalid under the equal protection provision of the Fourteenth Amendment to the Constitution of the United States if not so arbitrary as to be unreasonable and beyond the wide discretion that a legislature may exercise. Legislation is addressed to evils as they appear, and even degrees of evil may determine its exercise."

7. A contract may be voided, and although legal at the time it was made may be made illegal and unenforceable by legislative enactment. "If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise."

8. While freedom of contract is the general rule and restraint the exception, "there is, of course, no such thing [fol. 28] as absolute freedom of contract. It is subject to a great variety of restraints."

9. Under the powers inherent in every sovereignty a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. This is the very essence of government, and it is well expressed in the maxim sic utere tuo ut alienum non lædas. From this source comes the police powers, which "are nothing more or less than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things." When private property is affected with a public interest it ceases to be juris privati only.

10. Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.

11. "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this." The business to be affected is one in which the whole public has a direct and positive interest.

12. To say that a local agent of a fire insurance company shall be paid by salary instead of by commission as required by the act of 1935 (Ga. L. 1935, p. 139) and to declare

that the legislation is illegal is to put a restraint upon a power that has practical justifications.

13. No discrimination is made on account of citizenship.

14. No unconstitutional discrimination exists because the act was not made to apply to agents of mutual fire insurance companies.

[fol. 29] The Hartford Steam Boiler Inspection and Insurance Company, a non-resident corporation licensed to transact business as a casualty insurance company in the State of Georgia, and W. M. Francis, of Fulton County, Georgia, filed a petition for mandamus against William B. Harrison as insurance commissioner of Georgia, praying that the defendant be compelled by mandamus to issue to W. M. Francis a license as an insurance agent for the writing of casualty insurance. It was alleged that the insurance company filed with the insurance commissioner an application for the issuance of such license to Francis; that the insurance commissioner declined to issue the license solely upon the ground that under Section 1 of the act of the General Assembly approved March 28, 1935 (Ga. L. 1935, p. 139), prescribing the terms on which the insurance commissioner was authorized to license insurance agents, no salaried employees of an insurance company should be licensed to act as agent or to issue contracts of insurance except employees of mutual insurance companies; that this provision of the act of 1935 is violative of the fourteenth amendment of the constitution of the United States, in that said provision is arbitrary, unreasonable and capricious, and bears no reasonable relation to the public or to any other matter or thing within the police power of the State, and deprives the petitioners of their property and of their liberty without due process of law; that for the same reason said act violates art. 1, sec. 1, par. 3, of the constitution of Georgia, wherein it is provided that no person shall be deprived of property without due process of law; that said statute, in discriminating against said stock companies and the agents thereof and in favor of mutual companies and the agents thereof, sets up an arbitrary and capricious classification bearing no reasonable relation to the subject matter of the legislation, and no reasonable relation to the [fol. 30] protection of the public, or any other matter within the legislative authority; that said provision is also viola-

tive of art. 1, sec. 1, par. 2, of the constitution of Georgia, providing that protection to person and property is the paramount duty of government, and shall be impartial and complete. The insurance commissioner in his response admitted that the license prayed for had been refused solely on the ground that Francis was a salaried employee of the insurance company, and that under the terms of the act of 1935 he was ineligible to be so licensed. The judge of the superior court, upon the pleadings, granted a mandamus absolute, requiring the insurance commissione to issue the license prayed, holding that the classification made in the act of 1935 is unconstitutional. To this judgment the insurance commissioner excepted.

RUSSELL, Chief Justice (after stating the foregoing facts):

1. The superior court having by mandamus ordered the insurance commissioner of Georgia to issue a license to W. M. Francis, the local agent for the Hartford Steam Boiler Inspection and Insurance Company at Atlanta, and the commissioner having excepted by bill of exceptions, the question is presented as to whether the act approved March 28, 1935, upon the subject of agents and solicitors of insurance is unconstitutional. The superior court held that Section 1 of the foregoing act (Ga. L. 1935, p. 139) is violative of the fourteenth amendment to the constitution of the United States, Code, § 1-815, and in conflict with section 1, art. 1, par. 2 and 3 of the constitution of Georgia, Code, §§ 2-102 [fol. 31] 2-103. If as charged in the petition for mandamus in this case the classification made by the General Assembly in the passage of this act is arbitrary, capricious and not based upon any reasonable ground, but upon grounds which have no reasonable relation to the subject of fire insurance, it should be admitted that section 1 of the act of 1935, which is sought to be obliterated from the statute books, is unconstitutional. If the General Assembly in the passage of this legislation with relation to fire insurance companies exceeded its constitutional power to classify businesses in determining the regulations to be applied to occupational taxes it is unconstitutional. But a court can not lightly declare an act of the General Assembly unconstitutional, for every presumption is in favor of the constitutionality of the acts of the legislative department of the State government, and it is a fixed rule that if there should

be a doubt upon the subject the doubt must be resolved in favor of its constitutionality. It is not to be denied that there is a limit to the power of classification beyond which the State of Georgia can not go. A mere difference in the nature or character of two businesses sought to be regulated by legislative enactment will not be sufficient to justify separate classification of each business into different classes. But if a business is affected with a great public interest in which all of the citizens of the State are concerned, and injury will result to the general public unless regulatory control be applied, a right of classification arises on behalf of the general public. It must be recognized that the State of Georgia has an inherent, sovereign right to properly classify all businesses carried on within its borders, and the State could rightfully even altogether forbid it being carried on within the State. That which a State may do with [fol. 32] corporations of its own creation it may do with foreign corporations admitted into it. California v. Hooper, 155 U. S. 648, 652, cited, approved and applied in Orient Insurance Company v. Daggs, 172 U. S. 557. In the latter case it was said on page 562: "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283. We said in that case that 'the State may distinguish, select and classify objects of legislation and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured—differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the State has is exhibited by analogous if not exact examples to the Missouri statute in

Railway Company v. Mackey, 127 U. S. 204, 208, and in Minneapolis & St. Louis Railway v. Beckwith, 129 U. S. 26." If the Hartford Steam Boiler Inspection and Insurance Company, one of the applicants for mandamus, is a foreign corporation, it has no inherent right to a license [fol. 33] which the courts of this State are required to recognize or enforce by mandamus. Mr. Francis, the applicant for a license as the local agent, being a citizen of this State, the question will be considered as to him. One of the reasons upon which it is claimed that the act of the General Assembly now under consideration is unconstitutional is that it interferes with and destroys the right of contract. As to this we will use the language of Mr. Justice Holmes of the Supreme Court of the United States where he says in Adkins v. Children's Hospital, 261 U. S. 525, in a dissenting opinion on page 568 that a contract is "merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. German Alliance Insurance Co. v. Lewis, 233 U. S. 389." See other instances cited therein, as to the control properly exercised by government over contract on page 569 of Adkins v. Children's Hospital, supra. In German Alliance Insurance Co. v. Lewis, supra, dealing with the business of fire insurance as to the case now under consideration the Supreme Court of the United States held that the business of insurance is so far affected with the public interest as to justify legislative regulation (legislative regulation of rates); "A public interest can [fol. 34] exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business; where a business, such as insurance, is affected by a public use, it is the business that is

the fundamental thing; property is but the instrument of such business; Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517; Brass v. North Dakota, 153 U. S. 391, demonstrates that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation; and the business of insurance falls within this principle; the fact that a contract for insurance is one for indemnity and is personal does not preclude regulation; a general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause; what makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy; the liberty of contract guaranteed by the fourteenth amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so held as to the regulation of rates of fire insurance; the inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. United States v. Delaware & Hudson Co., 213 U. S. 366; whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is matter for legislative judgment. This court can only determine whether the legislature has the power to enact it; a discrimination is not invalid under the equal protection provision of the fourteenth amendment if not so arbitrary as to be beyond the wide discretion that a legis- [fol. 35] lature may exercise; and so held as to a classification exempting farmers' mutual insurance companies doing only a farm business from the operation of an act regulating rates of insurance; a legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise. Ozan Lumber Co. v. Union National Bank, 207 U. S. 251." Louisville & Nashville R. v. Mottley, 219 U. S. 467, was a case in which a contract had been made by a railroad company with Mottley and his wife in settlement for injuries inflicted by the railroad company upon the latter, in consideration of which the railroad promised that as long as either husband or wife lived they should have annual free passes over the railroad and all its branches. The promise of the railroad as embodied in the

contract was complied with for many years, but after the passage of legislation forbidding the issuance of passes, save with certain specified exceptions, the railroad violated the contract upon the ground that it was without authority to comply. Suit was brought in the courts of Kentucky. The State circuit court required the railroad to issue to each of the plaintiffs a pass for the year 1909 and thereafter to renew such passes annually during their respective lives. This judgment was affirmed by the Court of Appeals of Kentucky, and the case was taken by the railroad to the Supreme Court of the United States and there reversed upon the ground that the government had the right to destroy the contract if contrary to public policy expressed by Congress in the passage of the act forbidding the issuance of passes. It seems to us that this case is conclusive upon the point that the legislature of Georgia has the right in exercising the public policy of the State to determine what contracts and the kind of contracts that shall be lawful to those who desire to carry on a business which is im- [fol. 36] pressed with a general public interest. We have shown that this principle has been uniformly recognized by the Supreme Court of the United States. In the Mottley case, supra, after holding that the agreement to furnish passes was valid, the court says on page 480: "We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress by any statute subsequently enacted make its enforcement by suit impossible? There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the States and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the constitution. Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419; Addyston Pipe and Steel Co. v. United States, 175 U. S. 211, 229; Scranton v. Wheeler, 179 U. S. 141, 162, 163; C. B. & Q. R. R. Co. v. Drainage Com'rs., 20 U. S. 561; Union Bridge Co. v. United States, 204 U. S. 364, 400; Atlantic Coast Line &c. v. Riverside Mills, 219 U. S. 186, 202. In the Addyston Pipe case, this court said that, under its power to regulate commerce, Congress 'may enact such legislation as shall declare void

and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.' • • • In the Addyston Pipe case (p. 228 above cited), the court said: 'We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating [fol. 37] upon the subject of contracts.'' These principles of nation wide application as to Congressional legislation are no less applicable in cases of State legislation affecting its power to act within the limits of a sovereign State. These principles are ancient. In Atkinson v. Ritchie, 10 East. 530, 534, it was said: ''That no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.'' In Pomeroy on Contracts, § 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding and that no action in law or equity could be maintained upon it, it is stated: ''This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by a subsequent statute.'' In Parsons on Contracts (6th ed.), 675, it is said: ''If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise.'' Further citation of authority would seem unnecessary. They are very numerous and are all one way.

The learned counsel for the defendant in error refers us to the case of Adkins v. Children's Hospital, 261 U. S. 525, and seems to rely largely upon that authority. We have no complaint or criticism of the decision, and so far as it is apposite to the proposition now before us what we hold is in accord therewith. However, we must say in all frankness that we are not greatly impressed by the contention that the ruling in that case supports the position of the defendant in error. We may remark in passing that the Adkins case expresses only the opinion of five out of nine Jus-

tices of the court. Mr. Justice Brandeis did not participate, [fol. 38] while Mr. Chief Justice Taft (with whom concurred Mr. Justice Sanford) wrote a vigorous dissent, and Mr. Justice Holmes on his part did the same thing. The court was only reviewing a decision of a Board to which Congress had delegated the enforcement of an act of September, 1918, providing for the fixing of minimum wages of women in the District of Columbia. The act provided for "a Board of three members to be constituted as far as practicable so as to be representative of employers, employees and the public." The Board was authorized to have public meetings at which persons interested in the matter to be investigated might appear and testify, and to administer oaths, issue subpœnas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect. There are other provisions of this act which are quoted by Mr. Justice Sutherland, the author of the majority opinion. The Congressional legislation under review related solely to labor and the problems growing out of the employment of labor. We question whether, under any definition applicable to fire insurance agents, they can be classed as laborers in the sense in which that term is usually employed in litigation affecting the right of employees who are laborers as in the Adkins case. In the course of the opinion Mr. Justice Sutherland makes a separate division of those who may be subject to the act of Congress then under review by the Supreme Court of the United States, dividing it into four distinct classes to which we shall presently refer. As to this classification Mr. Justice Sutherland, speaking for a majority of the court, says: "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be [fol. 39] justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest. (1) Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest. * * * (2) Statutes re-

lating to contracts for the performance of public work. • • • (3) Statutes prescribing the character, method and time for payment of wages. • • • (4) Statutes fixing hours of labor." The three last subdivisions have no reference or application to such a case as is now before us. The first is applicable, but it furnishes no support to the contention of the defendant in error in this case. As stated by Mr. Justice Sutherland, the case of Munn v. Illinois, 94 U. S. 113, is sufficient citation to support the proposition that there may be an interference with a contract as to those dealing with statutes fixing charges to be exacted or contracts made by businesses impressed with a public interest. Munn's case states: "1. Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. 2. It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, millers, wharfingers, innkeepers, etc., and, in so doing, to fix a minimum of charge to be made for services rendered, accommodations furnished, and articles sold. 3. Down to the time of the adoption of the fourteenth amendment of the constitution of the United States, it was not supposed that statutes regulating the use, or even the [fol. 40] price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such deprivation." Treating, as we do, that one's right to contract is property of which he can not be deprived except by due process of law, we proceed to the holding in the Munn case as stated in the 5th headnote: "5. Rights of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. [As has been done by the legislature of Georgia in this instance in the passage of the act of 1935.] The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. 6. The limita-

tion by legislative enactment of the rate of charges [or likewise the method of compensation] for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one." The Supreme Court of the United States concluded by saying in the 10th headnote that "The act of the General Assembly of Illinois, entitled 'An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the constitution of this State,' approved April 25, 1871, is not repugnant to the constitution of the United States." In delivering the opinion of the court in this case Mr. Chief Justice Waite says: "The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power [fol. 41] of the States imposed by the constitution of the United States, fix by law the minimum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels can not be accurately preserved.' It is claimed that such a law is repugnant—1. To that part of sec. 8, art. 1, of the constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States;' 2. To that part of sec. 9 of the same article which provides that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;' and 3. To that part of amendment 14, which ordains that no State shall 'deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' We will consider the last of these objections first. Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained. The constitution contains no definition of the word 'deprive,' as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to astertain the effect which usage has given it, when employed in the same or a like connection. While this

provision of the amendment is new in the constitution of the United States, it is old as a principle of civilized government. It is found in Magna Charter, and, in substance if not in form, in nearly or quite all the constitutions that [fol. 42] have been from time to time adopted by the several States of the Union. By the fifth amendment, it was introduced into the constitution of the United States as a limitation upon the power of the national government, and by the fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States. When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the government of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions. When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and [fol. 43] each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private. Thorpe v. R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to

injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *Licenses Cases,* 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, • • • that is to say, • • • the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. • • • This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to [fol. 44] the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." After referring at length to two statements of Lord Hale, it was stated that "his statement of the law was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century [then the 19th century] in Bolt v. Stennett, 8 T. R. 606."

The statement in the Munn case on page 133, is in our opinion clearly applicable to the business of fire insurance involved in the present case: "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be con-

ceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. * * * If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. * * * It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. * * * The controlling fact is the power to regulate at all. * * * But a mere common-law law regulation of trade or business may [fol. 45] be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." Munn v. Illinois, 94 U. S. 113, 133.

Our sister State of South Carolina has an act approved March 2, 1916, which provides "for the licensing of insurance brokers," defined to be such "person as shall be licensed by the insurance commissioner to represent citizens" of the State "for the placing of insurance in insurers" in the "State or in any other State or country." It is provided in § 2 of the act, among other conditions, that only such persons may be licensed as are residents of the State and have been licensed insurance agents of the

State for at least two years. La Tourette offered to comply with all the provisions of the act, but could not comply with the requirement of § 2, he being, as he alleged, a resident and citizen of New York; and he attacked the requirements by a petition in the Supreme Court of South Carolina by which he charged it to be a violation of the constitution of the State and of § 2 of article 4 and the fourteenth amendment of the constitution of the United [fol. 46] States, in that he, a citizen of New York, was denied the privileges and immunities granted to citizens of the State of South Carolina and deprived of liberty and property without due process of law. He further alleged that the commissioner had refused to issue a license to him and prayed that he be required to do so. The court sustained a demurrer to the petition and dismissed the petition. Mr. Justice McKenna, speaking for the Supreme Court of the United States, said in the opinion rendered in the case appealed to that court, LaTourette v. McMaster, 248 U. S. 465: "The pleadings and the action of the court indicate the question in the case, and, it would seem the elements of it, * * *. They seem to be (1) That LaTourette is deprived of his liberty and a property right by the act of the State in violation of the due process clause of the fourteenth amendment. (2) That the act discriminates against citizens of other States in favor of citizens of the State of South Carolina in violation of § 2, Article IV of the constitution of the United States. (1) This contention depends upon the character of the business of insurance, and it was decided in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, to be clothed with a public interest and subject, therefore, to the regulating power of the State. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (Hooper v. California, 155 U. S. 648, 657), and his fidelity to both may be the concern of the State to secure. As said by the Supreme Court of the State: 'It is important for the protection of the interests of the people of the State that the

[fol. 47] business should be in the hands of competent and trustworthy persons. And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance. The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate. But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.' It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 365, 366, and cases cited; also Bunting v. Oregon, 243 U. S. 426, 437. (2) This contention, that is, that the act discriminates against citizens of other States and thereby offends the constitution of the United States, is La Tourette's ultimate reliance, and to it his counsel devote their entire argument. The State replies its power over insurance and that the legislation it justifies extends to its agents and is best executed when they are residents of the State. This view we have sustained, and manifestly to declare the legislation illegal is to put a restraint upon a power that has practical justifications. The illegality of the act is, however, earnestly urged and that it is a 'trade regulation' and recognizes 'the business trade or occupation of an insurance broker as proper and legitimate,' and yet denies to La Tourette, a citizen of New York, the right to engage in it and thereby abridges the privileges and immunities that he has as a citizen. The contention is expressed and illustrated in a number of ways, and the privilege of a citizen is defined to be 'the right to pursue and obtain happiness and safety' and 'to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of [fol. 48] others,' and that whatever rights a State grants to its own citizens are the measure within its jurisdiction of the rights of the citizens of other States, and for these propositions Slaughter-House Cases, 16 Wall. 36, and Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, are cited. Other cases are also cited in illustration. We do not dispute the propositions, and to see if they determine against the act under review we must turn to its words, as did the Supreme Court of the State, whose inter-

pretation of them we must accept. It said, speaking by Mr. Justice Hydrick: 'A citizen of any State of the Union who is a resident of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license; on the other hand, a citizen of this State, who is not a resident of the State and has not been a licensed insurance agent of this State for two years, may not be licensed. No discrimination is made on account of citizenship. It rests alone on residence in the State and experience in the business.' And the court further said: 'Citizenship and residence are not the same thing, nor does one include the other. Cummings v. Wingo, 31 S. C. 427, 435, 10 S. E. 107, and authorities cited. But our conclusion is not rested upon the mere use of the word 'residents;' for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the court would so construe it; and in no event would the court sanction an evasion of the purpose and intent of this wise and wholesome provision of the constitution based on mere verbiage."

In support of the contention that the act of 1935 now under review is unconstitutional we are cited by counsel for the defendant in error to the case of Liggett Co. v. Baldridge, 278 U. S. 105, et cit. That case assails the constitutionality of a Pennsylvania act providing that every [fol. 49] pharmacy or drug store shall be owned only by a licensed pharmacist, and, in the case of corporations, associations and co-partnerships, requires that all the partners or members thereof shall be licensed pharmacists with certain stated exceptions. The Liggett Company was a Massachusetts corporation authorized to do business in Pennsylvania. At the time of the passage of the act it was empowered to own and conduct, and thereafter continued to own and operate a number of drug stores in that State and intended to carry on a retail business under the title of "drug store" or "pharmacy." All of the stockholders were not registered pharmacists, and the Pennsylvania State Board of Pharmacy refused to grant the Company a permit to carry on the business. The State Attorney General and the District Attorney of the county threatened to prosecute for a violation of the act. Suit was brought to enjoin them on the ground that the act contravened the due process and equal protection clauses of the fourteenth

amendment. The lower court refused an injunction, and finally dismissed the bill for want of equity. Liggett took the case to the Supreme Court of the United States, and that court reversed the judgment of the lower court. Justices Holmes and Brandeis dissented. The decision in that case can not affect the ruling we have made, nor can the authorities to which we are cited. The act of 1935 with reference to fire insurance concerns a matter affected with a public interest, and no such question was presented or could be presented by the Liggett case. The Company was merely conducting a private business of selling drugs. It is summed up by Mr. Justice Sutherland as follows: "In the light of various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation [fol. 50] to the public health; and that the act in question creates an unreasonable and unnecessary restraint upon private business. * * * The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the fourteenth amendment."

We do not deem the case of Adair v. United States, 208 U. S. 161, as apposite or applicable to the case before us. The Adair case involved the question whether it was within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce to discharge an employee simply because he was a member of a labor organization, and the court properly held that the Federal law was an invasion of the personal liberty as well as of the right of property and, therefore, unenforceable under the provisions of the fourteenth amendment which declares that no person shall be deprived of his liberty or property without due process of law.

The case of Coppage v. Kansas, 236 U. S. 1, related to a Kansas statute declaring it a misdemeanor punishable by fine or imprisonment for an employer to require an employee to agree not to become or to remain a member of any labor organization during the time of his employment, practically the converse of the question involved in the

Adair case, supra, so far as employer and employee are concerned. There is nothing in the decision as to the question of membership in labor organizations which is apposite to the Georgia case which we have under consideration.

As pointed out in Carlton v. Southern Mutual Insurance Co., 72 Ga. 371, the legislature seemed to be well aware of what this court and every other court knows, that a local [fol. 51] agent is largely dependent upon insurers for being able to procure any business, and that one who wishes to insure his home generally takes his insurance to a friend in whom he has confidence, and for this reason under the provisions of section 1 of the act of 1935 a salaried officer of a stock insurance company could not be a local agent. We are not concerned with what was the real reason for this is a question for the General Assembly, and not for the courts, to determine. We have judicial knowledge of the size and approximate population of the various towns in Georgia, and if local agents, who are best qualified to deal with the public, are placed upon salaries there would in a very short time be no local agents in any of the various small towns and villegas where there is a need for fire insurance.

As so recently as March 2, 1936, the Supreme Court of the United States in Bayside Fish Flour Co. v. Gentry, Advance Sheets Supreme Court Reporter, Vol. 56, No. 9, p. 513, March 15, 1936, decided that a California statute regulating manufacture, canning, and packing of sardines within the State was not an unlawful interference with interstate commerce, since to the extent that the act regulated the use of fish brought in to the State from the outside, it was justified as a shield against covert depletion of local supply; also that the statute limiting the taking of sardines for use in a reduction plant and prohibiting the use of any part of fish except offal in a reduction plant or by a reduction process did not deny process as against the contention that it deprived the owner of the reduction plant of the right to contract for the purchase of sardines taken from the high seas and brought into the State. Thereupon the court held what is applicable in this State, that the statute does not become unconstitutional merely because it has created a [fol. 52] condition of affairs which renders the making of a related contract, lawful in itself, ineffective. It was also decided in that case that whether legislative discretion

within its prescribed limits should be exercised in a particular manner is matter for judgment of the legislature, and earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance; also that legislative classification is not objectionable as arbitrary merely because inequality actually results. Upon the question as to whether the statute has any reasonable relation to the object of the enactment—viz., the conservation of the fish supply in the State—the court held that "We cannot invalidate them [the provisions of the statute] because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. McLean v. Arkansas, 211 U. S. 539, 547, 548, 29 S. Ct. 206, 53 L. Ed. 315. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. Chicago, etc. Railroad v. Nebraska, 170 U. S. 57, 77, 18 S. Ct. 513, 42 L. ed. 948. And see, generally, Chicago B. & Quincy R. R. Co. v. McGuire, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328. 'Whether the enactment is wise or unwise' this court said in that case (219 U. S. 549, 569, 31 S. Ct. 259, 263, 55 L. Ed. 328), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." This was said after it was ruled in the preceding paragraph of the opinion that "Second, The point that the provisions of the Fish and Game Code de- [fol. 53] prive appellant of its property without due process of law seems to be based upon the contention that appellant is denied the right to contract for the purchase of sardines taken from the high seas and brought into the State. Assuming the point to have been properly raised below, which is by no means clear, it is without merit. Undoubtedly the right to contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth Amendment. Adkins v. Children's Hospital, 261 U. S. 525, 545, 546, 43 S. Ct. 394, 67 L. ed. 785, 24 A. L. R. 1238, and cases cited. Plainly enough, however, that right is not directly interfered with by the legislative provisions in question. Nor, because they may operate indi-

rectly as a deterrent, do they, in the sense of the constitution, deprive appellant of the liberty of contract. A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective." The court concluded by saying: "We have considered the arguments of appellant tending to a different conclusion than that which we have reached; but at most these arguments do no more, than demonstrate that the question is debatable. And, if so, the effect of the action of the State legislature in passing the statute was to decide this debatable question against the view now advanced by appellant; and since we are unable to say that such a determination by the Legislature is clearly unfounded, we are precluded from overturning it. Radice v. New York, 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. ed. 690."

The employment of agents is a mere incident in the business of insurance and the instrumentality thereof, no matter how necessary to the business. Contracts for insurance on the part of a non-resident insurance company might be made by correspondence, should the non-resident company [fol. 54] be unwilling to obey the regulations imposed by this State as to resident agents within this territory. In this respect the case at bar is not unlike that of Williams v. Fears, a Georgia case, which was reviewed by the Supreme Court of the United States in 179 U. S. 270. See also, Kendrick v. The State, 39 S. E. 203.

2. Many authorities, such as the decisions of the Supreme Court of the United States and the courts of many of our sister jurisdictions, have been cited by eminent counsel in support of the proposition that section 1 of the act of 1935 (Ga. L. 1935, p. 139) offends art. 1, sec. 1, par. 2, and art. 1, sec. 1, par. 3 of the constitution of Georgia, and is also violative of the fourteenth amendment to the constitution of the United States. One basis of the argument is the contention that the provision of the act which relieves mutual fire insurance companies from the provision applicable to stock fire insurance companies, that no local fire insurance agent can be appointed who holds a salaried position with a stock fire insurance company, is arbitrary, unreasonable, and capricious, and bears no reasonable relation to the subject or to the public or anything which is within the police

power of the State. It is therefore, apparent that the question for our determination is whether the General Assembly in the passage of the provision with relation to mutual fire insurance companies exceeded its constitutional power, in determining the regulations to be applied to occupational taxes, to classify businesses. It is not to be denied that there is a limit to the power of classification, beyond which a General Assembly can not go. It is readily conceded that a mere difference in the nature or character of the two businesses sought to be regulated by legislative enactment will not be sufficient to justify separate classification of each business into different classes. But when it is quite evi- [fol. 55] dent (as we think in this case) that both classes of a business are affected with a great public interest in which all the citizens of the State are concerned, a radical difference is found, by which great injury will result to the public if like regulations be applied to the subject matter, there arises in behalf of the *the* public the right to classification. If, as charged in the petition for mandamus in this case, the distinction drawn by the General Assembly is arbitrary, capricious, and not based upon reasonable grounds, but upon grounds which have no reasonable relation to the subject, it perhaps might be admitted that section 1 of the act of 1935 which it is sought to obliterate and wipe from the statute book is unconstitutional. To the contrary, we are of the opinion that this portion of the act of 1935, supra, only recognizes the inherent sovereign right of the State of Georgia to properly classify a business done within its borders, and impressed with a public interest, which the State could rightfully altogether forbid to be carried on within the State.

That there is a radical difference (and the word "radical," taken from the Latin, means a difference in the root) between stock insurance companies and mutual insurance companies was held by this court in Carleton v. Southern Mutual Insurance Co., 72 Ga. 371. All the reasons given by this court for the wide distinction between mutual life insurance companies and stock life insurance companies apply with equal force when fire insurance is involved, as in this case. In that case it was held: "6. A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. Without

a charter, such an organization would be governed by the general law of partnership. When incorporated, they are [fol. 56] subject to the terms of their charter. The charter stands in the place of articles of partnership, and modifies the general law as respects losses and profits where the two conflict. But except as changed by the charter, equity will apply the general law of partnership in respect to interest in and division of profits. 7. The fundamental principle at the base of all partnerships is a division of profits or losses in some form or degree, equal or otherwise, as the terms may be; and in a mutual insurance company the idea of mutuality involves the result that each assured becomes interested in profits and liable for losses." The opinion delivered by Chief Justice Jackson is too long to quote fully many of the sentences pointing out the essential difference between a mutual insurance company and a stock insurance company. We content ourselves with quoting only two sentences, though the thought is more than once repeated in the opinion: "It will thus be seen that the fundamental principle on which this opinion rests is, that this company, by its charter, became a mutual company; that no amendment thereto has altered the nature breathed into it when first the General Assembly gave it birth, but it remains today a mutual insurance company; that thus liability for losses and participation in profits became an ingredient in the character of each insured and insurer, and therefore, when each paid up his whole liability for losses, he became entitled to share the profits. The venture was mutual between all the members; and while the legal title was in the corporation to everything, the equitable interest was in the corporators, whose contributions made it all." What the legislature sought to do in section 1 of the act of 1935, supra, is analogous to the different classifications which have been made as to interest rates to be paid by different classes in borrowing. This court upheld many years ago, and later, laws which placed building and [fol. 57] loan associations in an entirely different class from borrowers of money who were not members of a building and loan association, with the result that many borrowers finally had to pay a rate of interest far beyond eight per cent. In some cases the lender was permitted to lend money for an agreed term of years, calculate the interest for the entire time at eight per cent., and divide the

same by the number of months, thus agreeing to pay practically sixteen per cent. Code of 1933, § 16-101. Under § 57-116 of the Code, while the general maximum contract rate was still eight per cent., the lender was permitted to lend at six per cent. for an agreed number of years, and add the interest and principal and receive monthly payments, thus making the interest rate twelve per cent. And though by the small-loan act of 1920 (§ 25-313) lenders were permitted to charge interest at the rate of three and one half per cent. per month, this was reduced to one and one half per cent. by an act approved March 26, 1935 (Ga. L. 1935, p. 394).

We agree with learned counsel for the defendant in error that: "(1) Mere difference is not enough; (2) the classification must be reasonable, and not arbitrary; (3) the difference upon which the classification is based must bear some reasonable relation to the purposes of the legislation;" but we cannot agree with them that "The difference in the method required is not only arbitrary, as heretofore pointed out, but furthermore the discrimination as between the types of companies and their agents rests on a difference which has no reasonable relationship to the legislative purpose." As pointed out in Carlton v. Southern Mutual Insurance Co., supra, every officer, whether he be at the top or a mere local agent, in a mutual company is interested in the profits and losses of the concern. Not so with a stock [fol. 58] insurance company. The legislature seemed to be well aware of what this court and every other court knows —that the local agent is largely dependent upon insurers for being able to procure any business, and that one who wishes to insure his home generally takes his insurance to a friend in whom he has confidence; and for this reason they incorporated in section 1 the provision that a salaried officer of a stock insurance company could not be a resident agent. Counsel for the petitioner for mandamus plants his whole case upon the alleged discrimination in the portion of the act which relieves mutual companies from the foregoing provision. It is an old rule of jurisprudence in this court that if this court has any doubt as to the constitutionality of an act, the benefit of the doubt will be given in favor of the constitutionality. In this case we are not troubled with any doubt; for our opinion is that the section of the act of 1935 which is attacked does not offend either

the State or Federal constitution. The learned judge erred in making the mandamus nisi absolute, and requiring the insurance commissioner to issue a license contrary to the provisions of the act of 1935.

Judgment reversed. All the Justices concur, except Gilbert and Hutcheson, JJ., who dissent.

[fol. 59] IN SUPREME COURT OF GEORGIA

DISSENTING OPINION

GILBERT, Justice, dissenting:

It is settled that the business of insurance is affected with the public interest. Therefore it may be regulated by the State; but it is equally well settled that such regulation must not be arbitrary and must operate constitutionally. "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, —and is not a mere arbitrary selection." Gulf &c. Ry. Co. v. Ellis, 165 U. S. 150, 160. In Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, it was said: "The classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U. S. 412, 415; Air-Way Corp. v. Day, 266 U. S. 71, 85; Schlesinger v. Wisconsin, 270 U. S. 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' Gulf, Colorado and Santa Fe Ry. v. Ellis, 165 U. S. 150,

155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." In Gregory [fol. 60] v. Quarles, 172 Ga. 45, 48, Mr. Justice Atkinson discussed a similar question and spoke for the entire court on the subject of reasonable classification of business. It was there stated that "There should be some reasonable ground for such sub-classification, some difference which bears a just and proper relation to the attempted classification • • • some reason connected with or growing out of that paramount cause (public health) relied on for justification of the ordinance." Numerous authorities supporting these principles might be cited.

It is readily conceded that a just classification for some purposes might be made as between mutual companies and stock companies, but it does not follow that the same classification may be legally made as between mere employees of such companies. It is a matter of common knowledge that insurance agencies accept business subject to approval by the companies which they represent. It is not aparent, either from the statute or the brief of the plaintiff in error, how or in what manner the employee who accepts applications for insurance may affect the rights of those who are insured, or how the duties of the one affect the public interest differently from the other. The mere fact that one is an employee of a stock company, and therefore receives compensation from such company, does not stand upon any substantial different footing towards the insured than an employee doing the same business and employed by a mutual company. Neither of them can affect the rates or the terms of the contract. The terms of the statute apply not only to such employees of stock companies as may be paid a stipulated salary, but apparently apply to all such employees who receive any compensation, whether by salary or otherwise, from the company. Any such employee can not, under the statute, be licensed to do the business of an insurance agent. The statute does not undertake to regu- [fol. 61] late insurance agents. At one stroke it puts out of business one class. It restricts all such business to the competitor who is an employee of a mutual company. The only difference is that in one case the employee receives compensation from a stock company, and is forbidden to carry on the business, whereas if such an employee is an employee of a mutual company, he may be legally licensed

to do business. It clearly is intended to impose a handicap on stock companies, so that the competitor will not be on even terms. If this may be constitutionally done, then the next step may easily follow—the actual outlawing of stock insurance companies. If this may be done in the case of insurance companies, it may be done in the case of any business affected with a public interest. I think the statute is unconstitutional and subbect to the attacks made by the defendant in error, because there is no just and proper relation to the object sought. The classification is wholly unreasonable and arbitrary.

IN SUPREME COURT OF GEORGIA

DISSENTING OPINION

HUTCHESON, Justice, dissenting:

An act of the General Assembly approved March 28, 1935 (Ga. L. 1935, p. 139, § 1), provided as follows: "No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the insurance commissioner * * * the words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies however compensated." The Hartford Steam Boiler Inspection and [fol. 62] Insurance Company, a stock company duly authorized to do a casualty insurance business in this State, and W. M. Francis, a salaried employee of such company, applied to the insurance commissioner for a license to be issued to such employee as an agent of the company to write or issue policies of insurance in its behalf. The commissioner refused to issue license upon the sole ground that under the act of 1935 a license could not be issued to any salaried employee of such company. Whereupon, the applicants filed a suit for the writ of mandamus to compel the commissioner to issue a license to such employee in accordance with the application, contending that the pro-

vision of this statute which prohibits the licensing of a salaried employee, as distinguished from an employee who is compensated on a commission basis, is repugnant to the due process clauses of the State and Federal constitutions, and also that the exemption of agents of mutual insurance companies however compensated results in an unreasonable and arbitrary discrimination against the plaintiffs, causing the act to offend the equal protection clauses of such constitutions. Upon the trial of the mandamus case, the court held that the provisions in question were unconstitutional on both grounds and granted a mandamus absolute. To this judgment the insurance commissioner excepted.

1. The statute does not attempt to prescribe the amount of compensation to be paid to agents of insurance companies (cf. O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251), but as to stock companies places a restraint upon the manner of compensation to the extent of prohibiting license to any employee who is compensated by salary instead of by commissions. The mere mode of compensation as between salary and commissions is a matter which does not bear any reasonable relation to the public inter- [fol. 63] est or welfare, and the statute therefore deprives the plaintiff insurance company, which is authorized to do business in this State, as well as its salaried employee, of liberty and property without due process of law, in violation of the constitution of this State and the constitution of the United States. Article 3, section 7, paragraph 22 of the constitution of Georgia (Code § 2-1822); Smith v. City of Atlanta, 161 Ga. 769, 775; Gregory v. Quarles, 172 Ga. 45; Liggett Co. v. Baldridge, 278 U. S. 105; Adair v. United States, 208 U. S. 161; Coppage v. Kansas, 236 U. S. 1; Burns Banking Co. v. Bryan, 264 U. S. 504; People v. Ringe, 197 N. Y. 143 (90 N. E. 451); Hauser v. North British Mercantile Ins. Co., 206 N. Y. 455 (100 N. E. 52); Franklin Fire Ins. Co. v. Montoya (N. Mex.), 251 Pac. 390; Northwestern National Ins. Co. v. Fishback, 130 Wash. 490 (Pac. 36 A. L. R. 1507).

2. While there is a difference between stock companies and mutual companies engaged in the insurance business, the difference is not such as bears any reasonable relationship to the mere manner of compensating agents and thus does not afford a sufficient basis for classifying such companies for the purpose of providing that the one may not

compensate its agents by salary, while the other may remunerate its agents either by salary or commissions. It follows that the exemption as to agents of mutual companies contains an arbitrary and unwarranted discrimination against stock companies, and their salaried agents, and renders the challenged provisions of the statute contrary to the equal protection clauses of the State and Federal constitutions. Gregory v. Quarles, 172 Ga. 45; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.

It is my opinion that the judgment should be affirmed.

Adhered to after a rehearing, July 28, 1936.

[fol. 64] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR APPEAL—Filed August 5, 1936

To the Chief Justice of the Supreme Court of the State of Georgia:

Your petitioners, Hartford Steam Boiler Inspection and Insurance Company, and W. M. Francis, respectfully show:

They are the defendants in error in the above stated cause.

The said case originated as a suit brought by petitioners against William B. Harrison, insurance commissioner, in Fulton superior court, for a writ of mandamus requiring the said Insurance Commissioner to issue to petitioner W. M. Francis a license as an insurance agent authorizing the said Francis to act as such agent for petitioner, Hartford Steam Boiler Inspection and Insurance Company. In said suit for said writ of mandamus it was pointed out that under an act of the General Assembly of the State of Georgia, approved March 28, 1935, and published in Acts 1935, p. 139, it was provided that no salaried agent of a fire or casualty insurance company (other than a mutual company) should be licensed as a resident agent, and that the said Francis was a salaried agent. But the said suit for the said writ of mandamus attacked the validity of the said statute as violative of the Fourteenth Amendment of the Constitution of the United States in that it deprived com-

panies and their agents, including the plaintiffs in said case, of liberty and property without due process of law ,and denied to the companies and their agents, including the plaintiffs in said case, the equal protection of law; all of which more fully appears from the original petition in said case.

The answer of the Insurance Commissioner (plaintiff in error in this Court) took no issue on any matter connected [fol. 65] with said suit save and except only that the said Insurance Commissioner denied the unconstitutionality of the said statute of the State of Georgia.

Thus under the pleadings in the case the sole issue on which the same was to be determined, and was determined, was whether the said statute was unconstitutional in said respects.

Fulton superior court, upon the hearing of the cause, adjudged the said statute to be unconstitutional in the said respects and granted the writ of mandamus.

The said William B. Harrison as Insurance Commissioner, caused the said case to be appealed to the Supreme Court of Georgia by bill of exceptions and writ of error pursuant to the Georgia practice in such cases.

The Supreme Court of the State of Georgia on the 13th day of June, 1936, rendered a judgment reversing the judgment of Fulton superior court, and delivered an opinion herein, which said opinion, however, was withdrawn by the Court and is no longer of file or of record in this cause.

Thereupon petitioners filed a motion for a rehearing, and on the 17th day of July, 1936, the Supreme Court of the State of Georgia issued an order directing the said Insurance Commissioner to show cause why the previous judgment of the Supreme Court should not be vacated, and directing that the cause be reheard by briefs pursuant to said order.

Thereafter on the 28th day of July, 1936, the Supreme Court of the State of Georgia delivered a judgment whereby it adhered to its previous judgment reversing the judgment of Fulton superior court and delivered another opinion herein, which said opinion is of file and of record in this cause, and is the only opinion of the Supreme Court which is a part of the record herein. Two members of the Supreme Court, to wit, Justices Hutcheson and Gilbert, dissented from the judgment and delivered a dissenting opinion.

The Supreme Court of the State of Georgia is the highest court of said State in which a decision in this case may be had.

[fol. 66] In the manner aforesaid there was in said cause drawn in question the validity of a statute of the State of Georgia on the ground that said statute was repugnant to the Constitution of the United States, and the decision of the Supreme Court of Georgia is in favor of its validity notwithstanding your petitioners' contention that the said statute violates the Fourteenth Amendment of the Constitution of the United States in the respects aforesaid.

Therefore, in accordance with § 273 (a) of the Judicial Code (the same statute being set out as U. S. C., Title 28, § 344), and in accordance with the rules of the Supreme Court of the United States, the case is one which under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. Therefore, under the aforesaid Act of January 31, 1928, a review may be had as a matter of right by appeal.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to the rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by said rules.

The judgment of the Supreme Court of the State of Georgia now sought to be reviewed was a final judgment in that under the said judgment and the opinion of the Court, in the light of the proceedings had in said case, the said judgment leaves nothing for the trial court to do except the ministerial act of entering final judgment pursuant to the judgment and decision of the Supreme Court of the State of Georgia.

Furthermore, the parties to this case have stipulated in this cause that the sole question to be determined by the Supreme Court was the constitutionality of the Act and that upon its determination of that question judgment should be entered in the trial court in accordance with that determination as a ministerial act without further controversy, which said stipulation has been ordered filed as a

part of the record in the Supreme Court of the State of [fol. 67] Georgia.

Wherefore petitioners pray for the allowance of an appeal from the Supreme Court of the State of Georgia, the highest court of said State in which a decision in this cause may be had, to the Supreme Court of the United States, in order that the decision and final judgment of the Supreme Court of the State of Georgia may be examined and reversed, and also pray that a transcript of the record, proceedings, and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Georgia, under her hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of petitioners, and that the bond tendered by the petitioners be approved.

This the 5th day of Aug., 1936.

Harold Hirsch, Marion Smith, Attorneys for Petitioners, P. O. Address, Hurt Bldg., Atlanta, Ga.

[File endorsement omitted.]

[fol. 68] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 5, 1936

The petition of Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, defendants in error in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Georgia, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment, which said judgment is described in the petition for the allowance of an appeal, of the Supreme Court of the State of Georgia, as prayed in said petition, and that the

Clerk of the Supreme Court of the State of Georgia shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under her hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellants shall give a good and sufficient bond, in the sum of One Thousand ($1,000) Dollars, that said appellants shall prosecute said appeal to effect and answer all costs if they fail to make their plea good, and that said bond, when filed and ap-
[fol. 69] proved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

This the 5th day of August, 1936.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 70] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed August 5, 1936

The above named, Hartford Steam Boiler Inspection & Insurance Company and W. M. Francis, who are appellants herein to the Supreme Court of the United States and herein referred to as appellants, concurrently with the filing of their petition for apeal file this assignment of errors and say that the judgment of the Supreme Court of the State of Georgia in this case rendered on the thirteenth day of June, 1936, and finally adhered to on rehearing on the twenty-eighth day of July, 1936, is erroneous and injurious to these appellants in the following respects:

1. The Supreme Court of Georgia erred in reversing the judgment of the superior court of Fulton county wherein said superior court made absolute the mandamus nisi re-

quiring William B. Harrison, Insurance Commissioner, to issue to appellant, W. M. Francis, on the petition of appellant, Hartford Steam Boiler Inspection & Insurance Company, a license to act as resident insurance agent in the State of Georgia, which said suit for mandamus had drawn in question so much of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws, 1935, page 139) as prohibits a salaried employee of any fire, casualty or surety insurance company doing business in Georgia from acting as a resident agent of such company and from being licensed as such, appellants contending in said suit that said portion of said statute was repugnant to the Fourteenth Amendment of the Constitution of the United States and constituted a denial to appellants of the due process of law and of the equal protection of law granted by the said Four-
[fol. 71] teenth Amendment of the Constitution of the United States.

2. The Supreme Court of Georgia erred in holding that the part of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Law, 1935, page 139) as prohibits a salaried employee of any fire, casualty or surety company doing business in Georgia, other than a mutual company, from acting as resident agent of such company and from being licensed as such was not repugnant to the Fourteenth Amendment of the Constitution of the United States and was not unconstitutional and void.

3. The Supreme Court of Georgia erred in holding that the part of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws, 1935, page 139) as prohibits a salaried employee of any fire, casualty or surety company doing business in Georgia, other than a mutual company, from acting as resident agent of such company and from being licensed as such was not repugnant to the Fourteenth Amendment of the Constitution of the United States and was not a denial to the appellants of the due process of law granted by the Fourteenth Amendment of the Constitution of the United States contrary to the contentions of appellants that the said statute of the State of Georgia in prohibiting salaried agents from acting as resident agent and

being licensed as such was arbitrary, capricious and unreasonable and set up a prohibition bearing no relationship to the public health, morals or welfare or any matter within the domain of the police power, and hence deprived both appellants and other companies and agents similarly situated of their liberty and property without due process of law in violation of the constitutional provision aforesaid.

4. The Supreme Court of Georgia erred in holding that the part of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws, 1935, page 139) as prohibits a salaried employee of any fire, casualty or surety company doing business in Georgia, other than a mutual company, from acting [fol. 72] as resident agent of such company and from being licensed as such was not repugnant to the Fourteenth Amendment of the Constitution of the United States, appellants contending that said statute in discriminating against stock companies and their agents in favor of mutual companies and their agents was arbitrary, capricious and unreasonable and set up a classification bearing no reasonable relationship to the subject matter of the legislation and bearing no reasonable relationship to the public health, morals or welfare or to any other matter within the domain of the police power and constituted a denial to appellants and to other stock companies and their agents similarly situated of the due process of law and the equal protection of law guaranteed by the constitutional provision aforesaid.

Wherefore, appellants pray that the judgment complained of be set aside and reversed.

Harold Hirsch, Marion Smith, Attorneys for Appellants.

[File endorsement omitted.]

[fols. 73 & 74] Citation, in usual form, showing service on M. J. Yeomans et al., filed August 5, 1936, omitted in printing.

[fols. 75-126] Bond on appeal for $1,000.00, approved and filed August 5, 1936, omitted in printing.

[fol. 127] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 5, 1936

To the Clerk of the Supreme Court of the State of Georgia:

The above named defendants in error as appellants in the appeal in this case file this præcipe to indicate to you the portions of the record to be incorporated in the transcript on appeal. You will make the transcript of the record and transmit the same to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Georgia, duly certifying the same and incorporating therein the following portions of the record:

1. The original petition filed by the plaintiffs in Fulton superior court; and amendment thereto;

2. The mandamus nisi issued thereon;

3. The defendant's answer to said petition; and amendment thereto;

4. The order and judgment of Fulton superior court by his Honor Judge John D. Humphries, making the mandamus absolute and requiring the insurance commissioner to issue a license to W. M. Francis;

5. The bill of exceptions and order certifying and approving the same;

5½. Stipulation of counsel, and order making the same part of the record in the Supreme Court;

6. The judgment of the Supreme Court of the State of Georgia on the thirteenth day of June, 1936, reversing the judgment of Fulton superior court upon the ground that that court erred in making the mandamus absolute and in requiring the license to be issued;

7. The judgment of the Supreme Court of the State of [fol. 128] Georgia on the seventeenth day of July, 1936, ordering the insurance commissioner to show cause why its previous judgment should not be vacated;

8. The judgment of the Supreme Court of the State of Georgia on the twenty-eighth day of July, 1936, adhering to its judgment rendered on the thirteenth day of June, 1936;

9. The opinion of the Supreme Court of the State of Georgia. By this is meant the majority opinion;

10. The dissenting opinion of Justice Gilbert, and the dissenting opinion of Justice Hutcheson;

11. The petition for the allowance of an appeal to the Supreme Court of the United States;

12. The order allowing the same;

13. The citation and the acknowledgment of service thereon.

14. The assignments of error on appeal to the Supreme Court of the United States;

15. The bond on appeal to the Supreme Court of the United States;

16. The statement as to the jurisdiction of the Supreme Court of the United States;

17. The acknowledgment of service of the petition for appeal, order allowing the same, assignments of error and statement as to jurisdiction, including therein the notice with respect thereto;

18. This præcipe with the acknowledgment of service thereon.

This 5th day of August, 1936.

Harold Hirsch, Marion Smith, Attorneys for Appellants.

[fols. 129-131] Due and legal service of the foregoing præcipe is hereby acknowledged. This 5 day of August, 1936.

M. J. Yeomans, Attorney General; B. D. Murphy, Attorney General and Assistant Attorney General, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 132] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 133] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS TO BE RELIED ON AND THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed September 10, 1936

Appellants intend to rely upon the following points:

1

The Supreme Court of the State of Georgia erred in reversing the judgment of the Superior Court of Fulton County and in holding that the Superior Court of Fulton County should not issue a mandamus requiring the Insurance Commissioner to issue a license to appellant, Francis, to act as agent for appellant, Hartford Steam Boiler Inspection and Insurance Company, notwithstanding the provisions of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws 1935, page 139).

2

The said judgment of the Supreme Court of the State of Georgia was erroneous in that it held constitutional that part of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws 1935, page 139) which prohibits a salaried agent of any fire, casualty or surety insurance company doing business in Georgia, other than a mutual company, from acting as resident agent of such company and from being licensed as such.

[fol. 134]

3

That part of the first section of the Act of the General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws 1935, page 139) which prohibits a salaried employee of any fire, casualty or surety insurance company doing business in Georgia, other than a mutual company, from acting as a resident agent of such company and being licensed as such is repugnant to the Fourteenth Amendment of the Constitution of the United States and constitutes a denial to appellants of the due process of law guaranteed by said provision of the Federal Constitution, in that it is arbitrary, unreasonable and capricious and bears no reasonable relationship to the public health, welfare or morals, or to any other matter within the so-called

police power, and is thus a denial to both appellants of liberty and property without due process of law.

4

That part of the first section of the Act of General Assembly of the State of Georgia, approved March 28, 1935, (Georgia Laws 1935, page 139) which prohibits a salaried employee of any fire, casualty or surety insurance company doing business in Georgia, other than a mutual company, from acting as resident agent of such company and being licensed as such is repugnant to the Fourteenth Amendment of the Constitution of the United States, in that the discrimination against stock companies and their agents in favor of mutual companies and their agents is arbitrary, capricious and unreasonable and bears no reasonable relationship to the subject matter of the legislation, and in this legislation bears no reasonable relationship to the public health, morals or welfare, or to any matter within the so-called police power, and hence denies to the appellants the equal protection of law and the due process of law guaranteed by the constitutional provision aforesaid. [fol. 135] Appellants specify the following parts of the record which they think necessary for the consideration of the aforesaid points:

1. The original petition filed by the plaintiffs in Fulton Superior Court and amendment thereto;

2. The mandamus nisi issued thereon;

3. The defendant's answer to said petition and amendment thereto;

4. The order and judgment of Fulton Superior Court by his Honor Judge John D. Humphries, making the mandamus absolute and requiring the insurance commissioner to issue a license to W. M. Francis;

5. The bill of exceptions and order certifying and approving the same;

6. The stipulation of counsel filed in the Supreme Court and the order to file the same with the record;

7. The judgment of the Supreme Court of the State of Georgia on the thirteenth day of June, 1936, reversing the judgment of Fulton Superior Court upon the ground that that court erred in making the mandamus absolute and in requiring the license to be issued;

8. The judgment of the Supreme Court of the State of Georgia on the seventeenth day of July, 1936, ordering the

Insurance Commissioner to show cause why its previous judgment should not be vacated;

9. The judgment of the Supreme Court of the State of Georgia on the twenty-eighth day of July, 1936, adhering to its judgment rendered on the thirteenth day of June, 1936;

[fol. 136] 10. The opinion of the Supreme Court of the State of Georgia. By this is meant the majority opinion;

11. The dissenting opinion of Justice Gilbert and the dissenting opinion of Justice Hutcheson;

12. The petition for the allowance of an appeal to the Supreme Court of the United States;

13. The order allowing the same;

14. The citation and the acknowledgment of service thereon;

15. The assignments of error on appeal to the Supreme Court of the United States;

16. The bond on appeal to the Supreme Court of the United States;

17. The statement as to the jurisdiction of the Supreme Court of the United States;

18. The acknowledgment of service of the petition for appeal, order allowing the same, assignments of error and statements as to jurisdiction, including therein the notice with respect thereto; and

19. Præcipe with the acknowledgment of service thereon.

Harold Hirsch, Marion Smith, Attorneys for Appellants.

Service of the foregoing is hereby acknowledged, copy received and further service waived.

This 8th day of Sept., 1936.

M. J. Yeomans, Attorney General; B. D. Murphy, Assistant Attorney General, Attorneys for Appellee.

[fol. 137] [File endorsement omitted.]

Endorsed on cover: Enter Marion Smith. File No. 40,895. Georgia Supreme Court. Term No. 355. Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, appellants, vs. William B. Harrison, Insurance Commissioner. Filed September 10, 1936. Term No. 355, O. T., 1936.

FILE COPY

FILED
SEP 10 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY AND W. M. FRANCIS,
Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

HAROLD HIRSCH,
MARION SMITH,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision believed to confer jurisdiction	1
Statute of the State of Georgia the validity of which is involved	2
Nature of the case and of the rulings	2
Opinion of the court below	8
Dissenting opinions	35, 37

Table of Cases Cited.

Clark, Receiver, v. Williard, 292 U. S. 112	5
Georgia Ry. Co. v. Decatur, 262 U. S. 436	5
Gulf Refining Co. v. United States, 269 U. S. 125	5
Moore v. New York Cotton Exchange, 270 U. S. 593	5

Statutes Cited.

Act of Congress of February 13, 1925, c. 229, 43 Stat. 936	1
Act of Congress of January 31, 1928, C. 14, 45 Stat. 54	2
Act of Congress of April 26, 1928, c. 440, 45 Stat. 46	2
Act of General Assembly of the State of Georgia, approved March 28, 1935, published in Georgia Laws 1935, p. 139	2
Constitution of the United States, 14th Amendment	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY AND W. M. FRANCIS,
Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This Court has jurisdiction of this appeal because it is a case wherein was drawn in question the validity of a statute of the State of Georgia as repugnant to the Constitution of the United States and the decision was in favor of the validity of said statute.

The Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, gives jurisdiction to this Court on writ of error to "a final judgment or decree in any suit in the highest

Court of a state in which a decision in the suit could be had where is drawn in question * * * the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 46, an appeal may be taken in any case which under prior statute could be reviewed as a matter of right on writ of error.

The statute of the State of Georgia, the validity of which is involved, is the Act of the General Assembly of the State of Georgia, approved March 28, 1935, published in Georgia Laws, 1935, commencing at page 139. The particular part of the statute is that part of the first section published on page 140 which provides that no salaried agent of any fire, casualty or surety insurance company doing business in Georgia shall be licensed as a resident agent of said company. The statute as a whole covers several pages and contains many provisions which are not involved. So far as relevant to this point the statute as a whole prohibits insurance policies of the kind indicated being issued except through a resident agent and then prohibits any salaried agent being licensed as a resident agent, but provides that this does not apply to salaried agents of mutual insurance companies. The statute in this respect is attacked as repugnant to the Fourteenth Amendment of the Constitution of the United States for the following reasons:

(a) Because the provision prohibiting salaried agents from being licensed as resident agents of said company is arbitrary, capricious and unreasonable and bears no reasonable relationship to the public health, morals or welfare or any other matter within the domain of the so-called police power. Hence, it deprives insurance companies and the

agents of insurance companies of liberty and property without due process of law; and

(b) Because the discrimination against stock companies and the agents thereof in favor of mutual companies and the agents thereof is arbitrary, capricious and unreasonable and bears no reasonable relationship to the subject matter of the legislation or to any matter of the public health, morals or welfare or any other thing within the domain of the so-called police power dealt with by said legislation. Appellants do not deny that such classification may be made in some instances but assert that the classification has no reasonable relationship to the subject matter of this legislation. Hence, the statute is a denial of the equal protection law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and for this further reason is a denial of due process of law.

The judgment of the Supreme Court of the State of Georgia sustaining the constitutionality of the Act was rendered on the thirteenth day of June, 1936. Thereafter, on a motion for rehearing, the Supreme Court of the State of Georgia on the seventeenth day of July, 1936, issued an order to the insurance commissioner to show cause why its previous judgment should not be vacated. Thereafter, on the twenty-eighth day of July, 1936, the Supreme Court of the State of Georgia delivered a judgment whereby it adhered to its previous judgment of June 13, 1936, and delivered an opinion sustaining the constitutionality of the Act with two of the six Justices dissenting and delivering dissenting opinions. The previous opinion of the Supreme Court of the State of Georgia which had accompanied its judgment of June 13, 1936, was permanently withdrawn when the motion for rehearing was filed and is not on file or of record in this case.

Suit was commenced in the Superior Court of Fulton County, Georgia, as a suit for mandamus brought by the appellant insurance company and the appellant Francis individually to require the appellee insurance commissioner to issue a license to the appellant Francis to act as resident agent of the appellant insurance company. The original petition plainly and distinctly sets out the attack on the constitutionality of the said statute in substantially the manner hereinbefore set out. Hence, the validity of the statute was drawn in question by the original suit.

The Superior Court of Fulton County held the statute unconstitutional in these respects and made the mandamus absolute. The judgment and ruling of the Superior Court of Fulton County, by his Honor Judge John D. Humphries, is presented in the record.

The insurance commissioner carried the case by writ of error to the Supreme Court of Georgia, which is the highest court of the State in which a decision could be had. That Court has rendered a final judgment reversing the Superior Court of Fulton County on the ground that the said trial court erred "in making the mandamus absolute and in requiring the insurance commissioner to issue a license contrary to the provisions of the act of 1935." Two of the six Justices of the Supreme Court of the State of Georgia dissented from the opinion. There is appended to this statement a copy of the opinion of the Supreme Court of the State of Georgia and a copy of the two dissenting opinions in the Supreme Court of the State of Georgia. These are all of the opinions rendered in said case. (Except an opinion which the Supreme Court of the State of Georgia first rendered and withdrew and which is no longer of file or available in the records of said court.) There is also found in the record a stipulation of counsel filed with the Supreme Court of the State of Georgia and made a part of the record in that court whereby counsel stipulated that "the sole

question involved in the litigation in this case is the constitutionality of the statute described in the pleadings." It was stipulated that in the event of an affirmance "no further judgment or action shall be necessary in the Superior Court." It was stipulated further that "in the event of a reversal of the judgment accompanied by an opinion holding the said statute valid the said judgment of reversal shall be and shall be treated as a final disposition of the case and without further resistance from either party the Superior Court of Fulton County shall enter a judgment making the judgment of the Supreme Court the judgment of the Superior Court."

The judgment in this case, although a judgment of reversal, is nevertheless a final judgment so as to be reviewable in this Court. The judgment being predicated upon the sole ground that the trial court erred in making the mandamus absolute and in requiring the insurance commissioner to issue a license, thereby carries with it the direction to the trial court not to make the mandamus absolute and not to require the insurance commissioner to issue a license. Since the sole purpose of the case as stated in the pleadings was to obtain this mandamus absolute the direction thus given by the Supreme Court of the State of Georgia to the trial court "leaves nothing for the trial court to do except the ministerial act of entering final judgment." In such a case the "judgment of reversal is final."

See also:

Moore v. *New York Cotton Exchange*, 270 U. S. 593;
Gulf Refining Co. v. *United States*, 269 U. S. 125.

And generally:

Georgia Ry. Co. v. *Decatur*, 262 U. S. 436;
Clark, Receiver, v. *Williard* et al., 292 U. S. 112.

The direction given the trial court arises out of the provision in the judgment of the Supreme Court of the State

of Georgia that the case is reversed because the trial court erred "in making the mandamus absolute and in requiring the insurance commissioner to issue a license contrary to the provisions of the Act of 1935." Placing this provision in the judgment itself makes it a part of the judgment and appearing on the face of the judgment. It is necessarily a direction to the trial court, since there could be no other reason for putting it in the judgment. The effect of the direction is to say to the trial court to enter a judgment denying the relief sought by the present appellants.

The fact that the said judgment is final so as to be appealable is fully confirmed by the stipulation of counsel which is a part of the record in the Supreme Court. The Attorney General of the State of Georgia, the Assistant Attorney General of the State of Georgia and the counsel for the appellants recognized and stipulated that the determination of the constitutional question by the Supreme Court of Georgia would be a final determination of the litigation and that the public interest made it desirable to shape the record so that the question involved could be reviewed by the Supreme Court of the United States without unnecessary delay. Hence, the stipulation was made hereinbefore described. It is obviously undesirable from a standpoint of the public interest that a state of uncertainty should continue as to whether the numerous salaried agents of insurance companies, most of whom were licensed before the Act of 1935 was passed, can still obtain licenses to represent their companies. Hence, the cooperation of counsel to see to it that it should be unnecessary for delay to result through the process of sending this case back to the trial court to do what it must do, namely, enter a judgment against the appellants; then have it appealed again to the Supreme Court of Georgia, and then, after long delay, appealed to the Supreme Court of the United States, to which an appeal lies in the case as a matter of right.

We do not believe the stipulation is necessary as the judgment of the reversal itself carries on its face a statement that makes it mandatory on the trial court to decide the case against the appellants, and hence on its face is final within the decisions above cited. The stipulation was made, however, to make it perfectly clear and a matter of record that counsel for both sides agreed that a judgment of reversal would be a final judgment.

The constitutional question is serious and not frivolous. The fact that the trial court held against the constitutionality of the Act and that the Supreme Court of Georgia was divided nearly evenly on the question, two Justices dissenting, makes the seriousness of the question too obvious for comment.

Respectfully submitted,

HAROLD HIRSCH,
MARION SMITH,
Attorneys for Appellants.

SUPREME COURT OF GEORGIA.

Case No. 11191.

HARRISON, *Insurance Commissioner*,

v.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY *et al.*

Decided June 13, 1936.

By the COURT:

1. Courts can not lightly declare an act of the General Assembly unconstitutional, for every presumption is in favor of the constitutionality of the acts of the legislative department of the State government, and it is a fixed rule that if there should be a doubt upon the subject the doubt must be resolved in favor of the constitutionality of the act.

2. It is not to be denied that there is a limit to the power of classification beyond which the State of Georgia can not go. A mere difference in the nature or character of the business sought to be regulated by legislative enactment will not be sufficient to justify classification of such business into different classes.

3. Where the business is affected with a great public interest in which all the citizens of the State are concerned, and injury will result to the general public unless regulatory control be applied, a right of classification arises on behalf of the general public.

4. The State of Georgia has an inherent, sovereign right to reasonably and properly classify all businesses carried on within its borders.

5. That which a State may do with corporations of its own creation it may do with foreign corporations admitted into it.

(a) The State may distinguish, select and classify objects of legislation, and necessarily the power must have a

wide range of discretion. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary.

6. In German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389, and in other cases, the Supreme Court of the United States has held that the business of insurance is so far affected with a public interest as to justify legislative regulation. It is within the power of the legislature to regulate the personal contracts involved in such business. It is the business that is the fundamental thing; property is but the instrument of such business.

"A business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation, and the business of insurance falls within this principle. That which makes for the general welfare is a matter of legislative judgment, and judicial review is limited to power and excludes policy. The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. If the legislature has the power to enact discriminatory legislation, the discrimination is not invalid under the equal protection provision of the Fourteenth Amendment to the Constitution of the United States if not so arbitrary as to be unreasonable and beyond the wide discretion that a legislature may exercise. Legislation is addressed to evils as they appear, and even degrees of evil may determine its exercise."

7. A contract may be voided, and although legal at the time it was made may be made illegal and unenforceable by legislative enactment. "If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise."

8. While freedom of contract is the general rule and restraint the exception, "there is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints."

9. Under the powers inherent in every sovereignty a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. This is the very essence of government, and it is well expressed in the maxim *sic utere tuo ut alienum non laedas*. From this source comes the police powers, which "are nothing more or less than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things." When private property is affected with a public interest it ceases to be *juris privati* only.

10. Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.

11. "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this." The business to be affected is one in which the whole public has a direct and positive interest.

12. To say that a local agent of a fire insurance company shall be paid by salary instead of by commissions as required by the act of 1935 (Ga. L. 1935, p. 139) and to declare that the legislation is illegal is to put a restraint upon a power that has practical justifications.

13. No discrimination is made on account of citizenship.

14. No unconstitutional discrimination exists because the act was not made to apply to agents of mutual fire insurance companies.

The Hartford Steam Boiler Inspection and Insurance Company, a non-resident corporation licensed to transact business as a casualty insurance company in the State of Georgia, and W. M. Francis, of Fulton County, Georgia, filed a petition for mandamus against William B. Harrison as insurance commissioner of Georgia, praying that the defendant be compelled by mandamus to issue to W. M. Francis a license as an insurance agent for the writing of casualty insurance. It was alleged that the insurance company filed with the insurance commissioner an application

for the issuance of such license to Francis; that the insurance commissioner declined to issue the license solely upon the ground that under Section 1 of the act of the General Assembly approved March 28, 1935 (Ga. L. 1935, p. 139), prescribing the terms on which the insurance commissioner was authorized to license insurance agents, no salaried employees of an insurance company should be licensed to act as agent or to issue contracts of insurance except employees of mutual insurance companies; that this provision of the act of 1935 is violative of the fourteenth amendment of the constitution of the United States, in that said provision is arbitrary, unreasonable and capricious, and bears no reasonable relation to the public or to any other matter or thing within the police power of the State, and deprives the petitioners of their property and of their liberty without due process of law; that for the same reason said act violates art. 1, sec. 1, par. 3, of the constitution of Georgia, wherein it is provided that no person shall be deprived of property without due process of law; that said statute, in discriminating against said stock companies and the agents thereof and in favor of mutual companies and the agents thereof, sets up an arbitrary and capricious classification bearing no reasonable relation to the subject-matter of the legislation, and no reasonable relation to the protection of the public, or any other matter within the legislative authority; that said provision is also violative of art. 1, sec. 1, par. 2, of the constitution of Georgia, providing that protection to person and property is the paramount duty of government, and shall be impartial and complete. The insurance commissioner in his response admitted that the license prayed for had been refused solely on the ground that Francis was a salaried employee of the insurance company, and that under the terms of the act of 1935 he was ineligible to be so licensed. The judge of the superior court, upon the pleadings, granted a mandamus absolute, requiring the insurance commissioner to issue the license prayed, holding that the classification made in the act of 1935 is unconstitutional. To this judgment the insurance commissioner excepted.

RUSSELL, Chief Justice. (After stating the foregoing facts.)

1. The superior court having by mandamus ordered the insurance commissioner of Georgia to issue a license to W. M. Francis, the local agent for the Hartford Steam Boiler Inspection and Insurance Company of Atlanta, and the commissioner having excepted by bill of exceptions, the question is presented as to whether the act approved March 28, 1935, upon the subject of agents and solicitors of insurance is unconstitutional. The superior court held that Section 1 of the foregoing act (Ga. L. 1935, p. 139) is violative of the fourteenth amendment to the constitution of the United States, Code, §1-815, and in conflict with sec. 1, art. 1, par. 2 and 3 of the constitution of Georgia, Code, §§2-102 and 2-103. If as charged in the petition for mandamus in this case the classification made by the General Assembly in the passage of this act is arbitrary, capricious and not based upon any reasonable ground, but upon grounds which have no reasonable relation to the subject of fire insurance, it should be admitted that Section 1 of the act of 1935, which is sought to be obliterated from the statute books, is unconstitutional. If the General Assembly in the passage of this legislature with relation to fire insurance companies exceeded its constitutional power to classify businesses in determining the regulations to be applied to occupational taxes it is unconstitutional. But a court can not lightly declare an act of the General Assembly unconstitutional, for every presumption is in favor of the constitutionality of the acts of the legislative department of the State government, and it is a fixed rule that if there should be a doubt upon the subject the doubt must be resolved in favor of its constitutionality. It is not to be denied that there is a limit to the power of classification beyond which the State of Georgia can not go. A mere difference in the nature or character of two businesses sought to be regulated by legislative enactment will not be sufficient to justify separate classification of each business into different classes. But if a business is affected with a great public interest in which all of the citizens of the State are concerned, and injury will result to the general

public unless regulatory control be applied, a right of classification arises on behalf of the general public. It must be recognized that the State of Georgia has an inherent, sovereign right to properly classify all businesses carried on within its borders, and the State could rightfully even altogether forbid it being carried on within the State. That which a State may do with corporations of its own creation it may do with foreign corporations admitted into it. California *v.* Hooper, 155 U. S. 648, 652, cited, approved and applied in Orient Insurance Company *v.* Daggs, 172 U. S. 557. In the latter case it was said on page 562: "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun *v.* Illinois Trust and Savings Bank, 170 U. S. 283. We said in that case that 'the State may distinguish, select and classify objects of legislation and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured—differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the State has is exhibited by analogous if not exact examples to the Missouri statute in Railway Company *v.* Mackey, 127 U. S. 204, 208, and in Minneapolis & St. Louis Railway *v.* Beckwith, 129 U. S. 26". If the Hartford Steam Boiler Inspection and Insurance Company, one of the applicants for mandamus, is a foreign corporation, it has no inherent right to a license which the courts of this State are required to recognize or enforce by mandamus. Mr. Francis,

the applicant for a license as the local agent, being a citizen of this State, the question will be considered as to him. One of the reasons upon which it is claimed that the act of the General Assembly now under consideration is unconstitutional is that it interferes with and destroys the right of contract. As to this we will use the language of Mr. Justice Holmes of the Supreme Court of the United States where he says in Adkins *v.* Children's Hospital, 261 U. S. 525, in a dissenting opinion on page 568 that a contract is "merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389." See other instances cited therein, as to the control properly exercised by government over contract, on page 569 of Adkins *v.* Children's Hospital, supra. In German Alliance Insurance Co. *v.* Lewis, supra, dealing with the business of fire insurance as to the case now under consideration the Supreme Court of the United States held that the business of insurance is so far affected with the public interest as to justify legislative regulation (legislative regulation of rates); "A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business; where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business; Munn *v.* Illinois, 94 U. S. 113; Budd *v.* New York, 143 U. S. 517; Brass *v.* North Dakota,

153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation; and the business of insurance falls within this principle; the fact that a contract for insurance is one for indemnity and is personal does not preclude regulation; a general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause; what makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy; the liberty of contract guaranteed by the fourteenth amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance; the inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. United States *v.* Delaware & Hudson Co., 213 U. S. 366; whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is matter for legislative judgment. This Court can only determine whether the legislature has the power to enact it; a discrimination is not invalid under the equal protection provision of the fourteenth amendment if not so arbitrary as to be beyond the wide discretion that a legislature may exercise; and so *held* as to a classification exempting farmers' mutual insurance companies doing only a farm business from the operation of an act regulating rates of insurance; a legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise. Ozan Lumber Co. *v.* Union National Bank, 207 U. S. 251." Louisville & Nashville R. *v.* Mottley, 219 U. S. 467, was a case in which a contract had been made by a railroad company with Mottley and his wife in settlement for injuries inflicted by the railroad company upon the latter, in consideration of which the railroad promised that as long as either husband or wife lived they should have annual free passes over the railroad and all its branches. The promise of the

railroad as embodied in the contract was complied with for many years, but after the passage of legislation forbidding the issuance of passes, save with certain specified exceptions, the railroad violated the contract upon the ground that it was without authority to comply. Suit was brought in the courts of Kentucky. The State circuit court required the railroad to issue to each of the plaintiffs a pass for the year 1909 and thereafter to renew such passes annually during their respective lives. This judgment was affirmed by the Court of Appeals of Kentucky, and the case was taken by the railroad to the Supreme Court of the United States and there reversed upon the ground that the government had the right to destroy the contract if contrary to public policy expressed by Congress in the passage of the act forbidding the issuance of passes. It seems to us that this case is conclusive upon the point that the legislature of Georgia has the right in exercising the public policy of the State to determine what contracts and the kind of contracts that shall be lawful to those who desire to carry on a business which is impressed with a general public interest. We have shown that this principle has been uniformly recognized by the Supreme Court of the United States. In the Mottley case, supra, after holding that the agreement to furnish passes was valid, the court says on page 480: "We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress by any statute subsequently enacted make its enforcement by suit impossible? There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the States and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the constitution. Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 Wheat. 419; Addyston Pipe and Steel Co. *v.* United States, 175 U. S. 211, 229; Scranton *v.* Wheeler, 179 U. S. 141, 162, 163; C. B. & Q. R. R. Co. *v.* Drainage Com'rs, 200 U. S. 561; Union Bridge Co. *v.* United States, 204 U. S.

364, 400; Atlantic Coast Line &c. *v.* Riverside Mills, 219 U. S. 186, 202. In the Addyston Pipe case, this Court said that, under its power to regulate commerce, Congress 'may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.' * * * In the Addyston Pipe case (p. 228 above cited), the court said: 'We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts.'" These principles of nation wide application as to Congressional legislation are no less applicable in cases of State legislation affecting its power to act within the limits of a sovereign State. These principles are ancient. In Atkinson *v.* Ritchie, 10 East. 530, 534, it was said: "That no contract can properly be carried into effect; which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." In Pomeroy on Contracts, § 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding and that no action in law or equity could be maintained upon it, it is stated: "This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by a subsequent statute." In Parsons on Contracts (6th Ed.), 675, it is said: "If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise." Further citation of authority would seem unnecessary. They are very numerous and are all one way.

The learned counsel for the defendant in error refers us to the case of Adkins v. Children's Hospital, 261 U. S. 525, and seems to rely largely upon that authority. We have no

complaint or criticism of the decision, and so far as it is apposite to the proposition now before us what we hold is in accord therewith. However, we must say in all frankness that we are not greatly impressed by the contention that the ruling in that case supports the position of the defendant in error. We may remark in passing that the Adkins case expresses only the opinion of five out of nine Justices of the court. Mr. Justice Brandeis did not participate, while Mr. Chief Justice Taft (with whom concurred Mr. Justice Sanford) wrote a vigorous dissent, and Mr. Justice Holmes on his part did the same thing. The court was only reviewing a decision of a Board to which Congress had delegated the enforcement of an act of September, 1918, providing for the fixing of minimum wages of women in the District of Columbia. The act provided for "a Board of three members to be constituted as far as practicable so as to be representative of employers, employees and the public." The Board was authorized to have public meetings at which persons interested in the matter to be investigated might appear and testify, and to administer oaths, issue subpœnas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect. There are other provisions of this act which are quoted by Mr. Justice Sutherland, the author of the majority opinion. The Congressional legislation under review related solely to labor and the problems growing out of the employment of labor. We question whether, under any definition applicable to fire insurance agents, they can be classed as laborers in the sense in which that term is usually employed in litigation affecting the right of employees who are laborers as in the Adkins case. In the course of the opinion Mr. Justice Sutherland makes a separate division of those who may be subject to the act of Congress then under review by the Supreme Court of the United States, dividing it into four distinct classes to which we shall presently refer. As to this classification Mr. Justice Sutherland, speaking for a majority of the court, says: "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints.

But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest. (1) Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest. • • • (2) Statutes relating to contracts for the performance of public work. • • • (3) Statutes prescribing the character, method and time for payment of wages. • • • (4) Statutes fixing hours of labor." The three last subdivisions have no reference or application to such a case as is now before us. The first is applicable, but it furnishes no support to the contention of the defendant in error in this case. As stated by Mr. Justice Sutherland, the case of Munn *v.* Illinois, 94 U. S. 113, is sufficient citation to support the proposition that there may be an interference with a contract as to those dealing with statutes fixing charges to be exacted or contracts made by businesses impressed with a public interest. Munn's case states: "1. Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. 2. It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, millers, wharfingers, innkeepers, etc., and, in so doing, to fix a minimum of charge to be made for services rendered, accommodations furnished, and articles sold. 3. Down to the time of the adoption of the fourteenth amendment of the constitution of the United States, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the

States from doing that which will operate as such deprivation." Treating, as we do, that one's right to contract is property of which he can not be deprived except by due process of law, we proceed to the holding in the Munn case as stated in the 5th headnote. "5. Rights of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. [As has been done by the legislature of Georgia in this instance in the passage of the act of 1935.] The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. 6. The limitation by legislative enactment of the rate of charges [or likewise the method of compensation] for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one." The Supreme Court of the United States concluded by saying in the 10th headnote that "The act of the General Assembly of Illinois, entitled 'An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the constitution of this State,' approved April 25, 1871, is not repugnant to the constitution of the United States." In delivering the opinion of the court in this case Mr. Chief Justice Waite says: "The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the constitution of the United States, fix by law the minimum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels can not be accurately preserved.' It is claimed that such a law is repugnant—1. To that part of sec. 8, art. 1, of the constitution of the United States which confers upon Congress the

power 'to regulate commerce with foreign nations and among the several States;' 2. To that part of sec. 9 of the same article which provides that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;' and 3. To that part of amendment 14, which ordains that no State shall 'deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' We will consider the last of these objections first. Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained. The constitution contains no definition of the word 'deprive', as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection. While this provision of the amendment is new in the constitution of the United States, it is old as a principle of civilized government. It is found in Magna Charter, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the fifth amendment, it was introduced into the constitution of the United States as a limitation upon the power of the national government, and by the fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States. When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a

part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the government of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions. When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private. Thorpe *v.* R. &. B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *Licenses Cases,* 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, • • • that is to say, • • • the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. • • • This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hun-

dred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." After referring at length to two statements of Lord Hale, it was stated that "his statement of the law was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century [then the 19th century] in Bolt *v.* Stennett, 8 T. R. 606."

The statement in the Munn case on page 133, is in our opinion clearly applicable to the business of fire insurance involved in the present case: "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. • • • If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. • • • It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. • • • The controlling fact is the power to regulate at all. • • •

But a mere common-law law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." Munn *v.* Illinois, 94 U. S. 113, 133.

Our sister State of South Carolina has an act approved March 2, 1916, which provides "for the licensing of insurance brokers," defined to be such "person as shall be licensed by the insurance commissioner to represent citizens" of the State "for the placing of insurance in insurers" in the "State or in any other State or country." It is provided in § 2 of the act, among other conditions, that only such persons may be licensed as are residents of the State and have been licensed insurance agents of the State for at least two years. La Tourette offered to comply with all the provisions of the act, but could not comply with the requirement of § 2, he being, as he alleged, a resident and citizen of New York; and he attacked the requirements by a petition in the Supreme Court of South Carolina by which he charged it to be a violation of the constitution of the State and of § 2 of article 4 and the fourteenth amendment of the constitution of the United States, in that he, a citizen of New York, was denied the privileges and immunities granted to citizens of the State of South Carolina and deprived of liberty and property without due process of law. He further alleged that the commissioner had refused to issue a license to him and prayed that he be required to do

so. The court sustained a demurrer to the petition and dismissed the petition. Mr. Justice McKenna, speaking for the Supreme Court of the United States, said in the opinion rendered in the case appealed to that court, La Tourette *v.* McMaster, 248 U. S, 465: "The pleadings and the action of the court indicate the question in the case and, it would seem, the elements of it. • • • They seem to be (1) That LaTourette is deprived of his liberty and a property right by the act of the State in violation of the due process clause of the fourteenth amendment. (2) That the act discriminates against citizens of other States in favor of citizens of the State of South Carolina in violation of § 2 Article IV of the constitution of the United States. (1) This contention depends upon the character of the business of insurance, and it was decided in German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389, to be clothed with a public interest and subject, therefore, to the regulating power of the State. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (Hooper *v.* California, 155 U. S. 648, 657), and his fidelity to both may be the concern of the State to secure. As said by the Supreme Court of the State: 'It is important for the protection of the interests of the people of the State that the business should be in the hands of competent and trustworthy persons. And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance. The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate. But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.' It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. Rast *v.* Van Deman & Lewis Co., 240 U. S.

342, 365, 366, and cases cited; also Bunting *v.* Oregon, 243 U. S. 426, 437. (2) This contention, that is, that the act discriminates against citizens of other States and thereby offends the constitution of the United States, is La Tourette's ultimate reliance, and to it his counsel devote their entire argument. The State replies its power over insurance and that the legislation it justifies extends to its agents and is best executed when they are residents of the State. This view we have sustained, and manifestly to declare the legislation illegal is to put a restraint upon a power that has practical justifications. The illegality of the act is, however, earnestly urged and that it is a 'trade regulation' and recognizes 'the business trade or occupation of an insurance broker as proper and legitimate,' and yet denies to La Tourette, a citizen of New York, the right to engage in it and thereby abridges the privileges and immunities that he has as a citizen. The contention is expressed and illustrated in a number of ways, and the privilege of a citizen is defined to be 'the right to pursue and obtain happiness and safety' and 'to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others,' and that whatever rights a State grants to its own citizens are the measure within its jurisdiction of the rights of the citizens of other States, and for these propositions Slaughter-House Cases, 16 Wall. 36, and Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, are cited. Other cases are also cited in illustration. We do not dispute the propositions, and to see if they determine against the act under review we must turn to its words, as did the Supreme Court of the State, whose interpretation of them we must accept. It said, speaking by Mr. Justice Hydrick: 'A citizen of any State of the Union who is a resident of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license; on the other hand, a citizen of this State, who is not a resident of the State and has not been a licensed insurance agent of this State for two years, may not be licensed. No discrimination is made on account of citizenship. It rests alone on residence in the State and experience in the business.' And the court further said:

'Citizenship and residence are not the same thing, nor does one include the other. Cummings *v.* Wingo, 31 S. C. 427, 435, 10 S. E. 107, and authorities cited. But our conclusion is not rested upon the mere use of the word 'residents;' for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the court would so construe it; and in no event would the court sanction an evasion of the purpose and intent of this wise and wholesome provision of the constitution based on mere verbiage."

In support of the contention that the act of 1935 now under review is unconstitutional we are cited by counsel for the defendant in error to the case of Liggett Co. *v.* Baldridge, 278 U. S. 105, et cit. That case assails the constitutionality of a Pennsylvania act providing that every pharmacy or drug store shall be owned only by a licensed pharmacist, and, in the case of corporations, associations and co-partnerships, requires that all the partners or members thereof shall be licensed pharmacists with certain stated exceptions. The Liggett Company was a Massachusetts corporation authorized to do business in Pennsylvania. At the time of the passage of the act it was empowered to own and conduct, and thereafter continued to own and operate a number of drug stores in that State and intended to carry on a retail business under the title of "drug store" or "pharmacy." All of the stockholders were not registered pharmacists, and the Pennsylvania State Board of Pharmacy refused to grant the Company a permit to carry on the business. The State Attorney General and the District Attorney of the county threatened to prosecute for a violation of the act. Suit was brought to enjoin them on the ground that the act contravened the due process and equal protection clauses of the fourteenth amendment. The lower court refused an injunction, and finally dismissed the bill for want of equity. Liggett took the case to the Supreme Court of the United States, and that court reversed the judgment of the lower court. Justices Holmes and Brandeis dissented. The decision in that case cannot affect the ruling we have made, nor can the authorities to which we are cited. The act of 1935 with reference to fire insurance con-

cerns a matter affected with a public interest, and no such question was presented or could be presented by the Liggett case. The Company was merely conducting a private business of selling drugs. It is summed up by Mr. Justice Sutherland as follows: "In the light of various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restraint upon private business. • • • The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment."

We do not deem the case of Adair *v.* United States, 208 U. S. 161, as apposite or applicable to the case before us. The Adair case involved the question whether it was within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce to discharge an employee simply because he was a member of a labor organization, and the court properly held that the Federal law was an invasion of the personal liberty as well as of the right of property and, therefore, unenforceable under the provisions of the Fourteenth Amendment which declares that no person shall be deprived of his liberty or property without due process of law.

The case of Coppage *v.* Kansas, 236 U. S. 1, related to a Kansas statute declaring it a misdemeanor punishable by fine or imprisonment for an employer to require an employee to agree not to become or to remain a member of any labor organization during the time of his employment, practically the converse of the question involved in the Adair case, *supra,* so far as employer and employee are concerned. There is nothing in the decision as to the question of membership in labor organizations which is

apposite to the Georgia case which we have under consideration.

As pointed out in Carlton *v.* Southern Mutual Insurance Co., 72 Ga. 371, the legislature seemed to be well aware of what this court and every other court knows, that a local agent is largely dependent upon insurers for being able to procure any businses, and that one who wishes to insure his home generally takes his insurance to a friend in whom he has confidence, and for this reason under the provisions of section 1 of the act of 1935 a salaried officer of a stock insurance company could not be a local agent. We are not concerned with what was the real reason for this is a question for the General Assembly, and not for the courts to determine. We have judicial knowledge of the size and approximate population of the various towns in Georgia, and if local agents, who are best qualified to deal with the public, are placed upon salaries there would in a very short time be no local agents in any of the various small towns and villages where there is a need for fire insurance.

As so recently as March 2, 1936, the Supreme Court of the United States in Bayside Fish Flour Co. *v.* Gentry, Advance Sheets Supreme Court Reporter, Vol. 56, No. 9, p. 513, March 15, 1936, decided that a California statute regulating manufacture, canning, and packing of sardines within the State was not an unlawful interference with interstate commerce, since to the extent that the act regulated the use of fish brought into the State from the outside, it was justified as a shield against covert depletion of local supply; also that the statute limiting the taking of sardines for use in a reduction plant and prohibiting the use of any part of fish except offal in a reduction plant or by a reduction process did not deny process as against the contention that it deprived the owner of the reduction plant of the right to contract for the purchase of sardines taken from the high seas and brought into the State. Thereupon the court held what is applicable in this State, that the statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective. It was also decided in that case that whether legislative discre-

tion within its prescribed limits should be exercised in a particular manner is matter for judgment of the legislature, and earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance; also that legislative classification is not objectionable as arbitrary merely because inequality actually results. Upon the question as to whether the statute has any reasonable relation to the object of the enactment—viz., the conservation of the fish supply in the State—the court held that "We cannot invalidate them [the provisions of the statute] because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. McLean *v.* Arkansas, 211 U. S. 539, 547, 548, 29 S. Ct. 206, 53 L. Ed. 315. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. Chicago, etc., Railroad *v.* Nebraska, 170 U. S. 57, 77, 18 S. Ct. 513, 42 L. Ed. 948. And see, generally, Chicago B. & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328. 'Whether the enactment is wise or unwise' this court said in that case (219 U. S. 549, 569, 31 S. Ct. 259, 263, 55 L. Ed. 328), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." This was said after it was ruled in the preceding paragraph of the opinion that "Second, The point that the provisions of the Fish and Game Code deprive appellant of its property without due process of law seems to be based upon the contention that appellant is denied the right to contract for the purchase of sardines taken from the high seas and brought into the State. Assuming the point to have been properly raised below, which is by no means clear, it is without merit. Undoubtedly the right to contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth Amendment. Adkins *v.* Children's Hospital, 261

U. S. 525, 545, 546, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, and cases cited. Plainly enough, however, that right is not directly interfered with by the legislative provisions in question. Nor, because they may operate indirectly as a deterrent, do they, in the sense of the constitution, deprive appellant of the liberty of contract. A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective." The court concluded by saying: "We have considered the arguments of appellant tending to a different conclusion than that which we have reached; but at most these arguments do no more than demonstrate that the question is debatable. And, if so, the effect of the action of the State legislature in passing the statute was to decide this debatable question against the view now advanced by appellant; and since we are unable to say that such a determination by the Legislature is clearly unfounded, we are precluded from overturning it. Radice *v.* New York, 264 U. S. 292, 294, 44 St. Ct. 325, 68 L. Ed. 690."

The employment of agents is a mere incident in the business of insurance and the instrumentality thereof, no matter how necessary to the business. Contracts for insurance on the part of a non-resident insurance company might be made by correspondence, should the non-resident company be unwilling to obey the regulations imposed by this State as to resident agents within this territory. In this respect the case at bar is not unlike that of Williams *v.* Fears, a Georgia case, which was reviewed by the Supreme Court of the United States in 179 U. S. 270. See also, Kendrick *v.* The State, 39 S. E. 203.

2. Many authorities, such as the decisions of the Supreme Court of the United States and the courts of many of our sister jurisdictions, have been cited by eminent counsel in support of the proposition that section 1 of the act of 1935 (Ga. L. 1935, p. 139) offends art. 1, sec. 1, par. 2 and art. 1, sec. 1, par. 3 of the constitution of Georgia, and is also violative of the fourteenth amendment to the constitution of the United States. One basis of the argument is the con-

tention that the provision of the act which relieves mutual fire insurance companies from the provision applicable to stock fire insurance companies, that no local fire insurance agent can be appointed who holds a salaried position with a stock fire insurance company, is arbitrary, unreasonable and capricious, and bears no reasonable relation to the subject or to the public or anything which is within the police power of the State. It is therefore, apparent that the question for our determination is whether the General Assembly in the passage of the provision with relation to mutual fire insurance companies exceeded its constitutional power, in determining the regulations to be applied to occupational taxes, to classify businesses. It is not to be denied that there is a limit to the power of classification, beyond which a General Assembly can not go. It is readily conceded that a mere difference in the nature or character of the two businesses sought to be regulated by legislative enactment will not be sufficient to justify separate classification of each business into different classes. But when it is quite evident (as we think in this case) that both classes of a business are affected with a great public interest in which all the citizens of the State are concerned, a radical difference is found, by which great injury will result to the public if like regulations be applied to the subject matter, there arises in behalf of the public the right to classification. If, as charged in the petition for mandamus in this case, the distinction drawn by the General Assembly is arbitrary, capricious, and not based upon reasonable grounds, but upon grounds which have no reasonable relation to the subject, it perhaps might be admitted that section 1 of the act of 1935 which it is sought to obliterate and wipe from the statute book is unconstitutional. To the contrary, we are of the opinion that this portion of the act of 1935, supra, only recognizes the inherent sovereign right of the State of Georgia to properly classify a business done within its borders, and impressed with a public interest, which the State could rightfully altogether forbid to be carried on within the State.

That there is a radical difference (and the word "radical," taken from the Latin, means a difference in the root) between stock insurance companies and mutual insurance companies was held by this court in Carlton *v.* Southern Mutual Insurance Co., 72 Ga. 371. All the reasons given by this court for the wide distinction between mutual life insurance companies and stock life insurance companies apply with equal force when fire insurance is involved, as in this case. In that case it was held: "6. A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. Without a charter, such an organization would be governed by the general law of partnership. When incorporated, they are subject to the terms of their charter. The charter stands in the place of articles of partnership, and modifies the general law as respects losses and profits where the two conflict. But except as changed by the charter, equity will apply the general law of partnership in respect to interest in and division of profits. 7. The fundamental principle at the base of all partnerships is a division of profits or losses in some form or degree, equal or otherwise, as the terms may be; and in a mutual insurance company the idea of mutuality involves the result that each assured becomes interested in profits and liable for losses." The opinion delivered by Chief Justice Jackson is too long to quote fully many of the sentences pointing out the essential difference between a mutual insurance company and a stock insurance company. We content ourselves with quoting only two sentences, though the thought is more than once repeated in the opinion: "It will thus be seen that the fundamental principle on which this opinion rests, is, that this company, by its charter, became a mutual company; that no amendment thereto has altered the nature breathed into it when first the General Assembly gave it birth, but it remains today a mutual insurance company; that thus liability for losses and participation in profits became an ingredient in the character of each insured and insurer, and therefore, when each paid up his whole liability for losses, he be-

came entitled to share the profits. The venture was mutual between all the members; and while the legal title was in the corporation to everything, the equitable interest was in the corporators, whose contributions made it all." What the legislature sought to do in section 1 of the act of 1935, supra, is analogous to the different classifications which have been made as to interest rates to be paid by different classes in borrowing. This court upheld many years ago, and later, laws which placed building and load associations in an entirely different class from borrowers of money who were not members of a building and loan association, with the result that many borrowers finally had to pay a rate of interest far beyond eight per cent. In some cases the lender was permitted to lend money for an agreed term of years, calculate the interest for the entire time at eight per cent., and divide the same by the number of months, thus agreeing to pay practically sixteen per cent. Code of 1933, § 16-101. Under § 57-116 of the Code, while the general maximum contract rate was still eight per cent, the lender was permitted to lend at six per cent for an agreed number of years, and add the interest and principal and receive monthly payments, thus making the interest rate twelve per cent. And though by the small-loan act of 1920 (§ 25-313) lenders were permtted to to charge interest at the rate of three and one-half per cent per month, this was reduced to one and one half per cent by an act approved March 26, 1935 (Ga. L. 1935, p. 394).

We agree with learned counsel for the defendant in error that: "(1) Mere difference is not enough; (2) the classification must be reasonable, and not arbitrary; (3) the difference upon which the classification is based must bear some reasonable relation to the purposes of the legislation;" but we cannot agree with them that "The difference in the method required is not only arbitrary, as heretofore pointed out, but furthermore the discrimination as between the types of companies and their agents rests on a difference which has no reasonable relationship to the legislative purpose." As pointed out in Carlton *v.* Southern Mutual Insurance Co., *supra*, every officer, whether he be at the

top or a mere local agent, in a mutual company is interested in the profits and losses of the concern. Not so with a stock insurance company. The legislature seemed to be well aware of what this court and every other court knows—that the local agent is largely dependent upon insurers for being able to procure any business, and that one who wishes to insure his home generally takes his insurance to a friend in whom he has confidence; and for this reason they incorporated in section 1 the provision that a salaried officer of a stock insurance company could not be a resident agent. Counsel for the petitioner for mandamus plants his whole case upon the alleged discrimination in the portion of the act which relieves mutual companies from the foregoing provision. It is an old rule of jurisprudence in this court that if this court has any doubt as to the constitutionality of an act, the benefit of the doubt will be given in favor of constitutionality. In this case we are not troubled with any doubt; for our opinion is that the section of the act of 1935 which is attacked does not offend either the State or Federal constitution. The learned judge erred in making the mandamus nisi absolute, and requiring the insurance commissioner to issue a license contrary to the provisions of the act of 1935.

Judgment reversed. All the Justices concur except Gilbert and Hutcheson, JJ., who dissent.

GILBERT, *Justice*, dissenting.

It is settled that the business of insurance is affected with the public interest. Therefore it may be regulated by the State; but it is equally well settled that such regulation must not be arbitrary and must operate constitutionally. "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one

based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." Gulf &c. Ry. Co. *v.* Ellis, 165 U. S. 150, 160. In Louisville Gas & Electric Co. *v.* Coleman, 277 U. S. 32, it was said: "The classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. *v.* Virginia, 253 U. S. 412, 415; Air-Way Corp. *v.* Day, 266 U. S. 71, 85; Schlesinger *v.* Wisconsin, 270 U. S. 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' Gulf, Colorado and Santa Fe Ry. *v.* Ellis, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." In Gregory *v.* Quarles, 172 Ga. 45, 48, Mr. Justice Atkinson discussed a similar question and spoke for the entire court on the subject of reasonable classification of business. It was there stated that "There should be some reasonable ground for such sub-classification, some difference which bears a just and proper relation to the attempted classification * * * some reason connected with or growing out of that paramount cause (public health) relied on for justification of the ordinance." Numerous authorities supporting these principles might be cited.

It is readily conceded that a just classification for some purposes might be made as between mutual companies and stock companies, but it does not follow that the same classification may be legally made as between mere employees of such companies. It is a matter of common knowledge that insurance agencies accept business subject to approval by the companies which they represent. It is not apparent, either from the statute or the brief of the plaintiff in error, how or in what manner the employee who accepts applications for insurance may affect the rights

of those who are insured, or how the duties of the one affect the public interest differently from the other. The mere fact that one is an employee of a stock company, and therefore receives compensation from such company, does not stand upon any substantially different footing towards the insured than an employee doing the same business and employed by a mutual company. Neither of them can affect the rates or the terms of the contract. The terms of the statute apply not only to such employees of stock companies as may be paid a stipulated salary, but apparently apply to all such employees who receive any compensation, whether by salary or otherwise, from the company. Any such employee can not, under the statute, be licensed to do the business of an insurance agent. The statute does not undertake to regulate insurance agents. At one stroke it puts out of business one class. It restricts all such business to the competitor who is an employee of a mutual company. The only difference is that in one case the employee receives compensation from a stock company, and is forbidden to carry on the business, whereas if such an employee is an employee of a mutual company, he may be legally licensed to do business. It clearly is intended to impose a handicap on stock companies, so that the competitor will not be on even terms. If this may be constitutionally done, then the next step may easily follow—the actual outlawing of stock insurance companies. If this may be done in the case of insurance companies, it may be done in the case of any business affected with a public interest. I think the statute is unconstitutional and subject to the attacks made by the defendant in error, because there is no just and proper relation to the object sought. The classification is wholly unreasonable and arbitrary.

HUTCHESON, *Justice*, dissenting:

An act of the General Assembly approved March 28, 1935 (Ga. L. 1935, p. 139, § 1), provided as follows: "No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except

through a resident agent licensed by the insurance commissioner. * * * The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies however compensated." The Hartford Steam Boiler Inspection and Insurance Company, a stock company duly authorized to do a casualty insurance business in this State, and W. M. Francis, a salaried employee of such company, applied to the insurance commissioner for a license to be issued to such employee as an agent of the company to write or issue policies of insurance in its behalf. The commissioner refused to issue the license upon the sole ground that under the act of 1935 a license could not be issued to any salaried employee of such company. Whereupon, the applicants filed a suit for the writ of mandamus to compel the commissioner to issue a license to such employee in accordance with the application, contending that the provision of this statute which prohibits the licensing of a salaried employee, as distinguished from an employee who is compensated on a commission basis, is repugnant to the due process clauses of the State and Federal constitutions, and also that the exemption of agents of mutual insurance companies however compensated results in an unreasonable and arbitrary discrimination against the plaintiffs, causing the act to offend the equal protection clauses of such constitutions. Upon the trial of the mandamus case, the court held that the provisions in question were unconstitutional on both grounds and granted a mandamus absolute. To this judgment the insurance commissioner excepted.

1. The statute does not attempt to prescribe the amount of compensation to be paid to agents of insurance companies (cf. O'Gorman & Young *v.* Hartford Ins. Co., 282 U. S. 251), but as to stock companies places a restraint upon the *manner* of compensation to the extent of prohibiting license to any employee who is compensated by salary instead of by commissions. The mere mode of compensation as be-

tween salary and commissions is a matter which does not bear any reasonable relation to the public interest or welfare, and the statute therefore deprives the plaintiff insurance company, which is authorized to do business in this State, as well as its salaried employee, of liberty and property without due process of law, in violation of the constitution of this State and the constitution of the United States. Article 3, section 7, paragraph 22 of the constitution of Georgia (Code § 2-1822); Smith *v.* City of Atlanta, 161 Ga. 775; Gregory *v.* Quarles, 172 Ga. 45; Liggett Co. *v.* Baldridge, 278 U. S. 105; Adair *v.* United States, 208 U. S. 161; Coppage *v.* Kansas, 236 U. S. 1; Burns Banking Co. *v.* Bryan, 264 U. S. 504; People *v.* Ringe, 197 N. Y. 143 (90 N. E. 451); Hauser *v.* North British Mercantile Ins. Co., 206 N. Y. 455 (100 N. E. 52); Franklin Fire Ins. Co. *v.* Montoya, (N. Mex.) 251 Pac. 390; Northwestern National Ins. Co. *v.* Fishback, 130 Wash. 490 (— Pac. —, 36 A. L. R. 1507).

2. While there is a difference between stock companies and mutual companies engaged in the insurance business, the difference is not such as bears any reasonable relationship to the mere manner of compensating agents and thus does not afford a sufficient basis for classifying such companies for the purpose of providing that the one may not compensate its agents by salary, while the other may remunerate its agents either by salary or commissions. It follows that the exemption as to agents of mutual companies contains an arbitrary and unwarranted discrimination against stock companies, and their salaried agents, and renders the challenged provisions of the statute contrary to the equal protection clauses of the State and Federal constitutions. Gregory *v.* Quarles, 172 Ga. 45; Louisville Gas & Electric Co. *v.* Coleman, 277 U. S. 32; Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389.

It is my opinion that the judgment should be affirmed.

Adhered to after a rehearing, July 28, 1936.

FILED
DEC 26 1936
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States

October Term, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER,

Appellee.

BRIEF FOR APPELLANTS

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SUBJECT INDEX

	PAGE
STATEMENT OF CASE	1-3
Statute Involved	2
Petition for Mandamus	2
Defendant's Answer	3
Decision of Trial Court and Supreme Court of Georgia	3
SPECIFICATION OF ASSIGNED ERRORS TO BE URGED	3-4
DUE PROCESS	4-24
Summary of Argument	4-6
Constitutional Right to Be Protected From Arbitrary Interference With Private Business or Liberty to Contract	6-8
Business Affected With a Public Interest Not Subject to Arbitrary and Unreasonable Restrictions	8-11
Means Adopted by Legislation Must Not Be Arbitrary and Unreasonable	11
Georgia Statute Arbitrary and Without Reasonable Relation to Any Purpose Within Competency of State	12-16
Analysis of Statute	12-13
O'Gorman Case Distinguished	14
Constitutional Right of Agent as Well as Company Involved	15
Illustrations of Operation of Statutes	15-16

SUBJECT INDEX—Continued

PAGE

Attempt of Appellee to Find Connection Between Restriction and Public Welfare Does Not Succeed 16-19

Connection Asserted by the Supreme Court of the State of Georgia Between Restriction and Public Welfare Not Well Founded 20-21

Cases Dealing Specifically With Insurance Agent Statutes 21-23

Georgia Act Intended to Serve Interests of Agents Working on Commissions. Cases Here in Point 23-24

DENIAL OF EQUAL PROTECTION OF LAW 25-28

Summary of Argument 25

Classification Must Bear Reasonable Relationship to Purpose of Legislation. Mere Difference Not Enough 25-26

Difference Between Stock Companies and Mutual Companies Bears No Relation to How Agents Paid 26-28

APPENDIX—Ga. Act of 1935 Here Involved 29-35

TABLE OF CASES CITED

	PAGE
Adair v. United States, 208 U. S. 161	4, 7
Adkins v. Children's Hospital, 261 U. S. 525	4, 8
Air-Way Corp. v. Day, 266 U. S. 71	25, 26
Appendix	29
Burns Baking Co. v. Bryan, 264 U. S. 504	5, 9
Coppage v. Kansas, 236 U. S. 1	4, 8
Franklin Fire Ins. Co. v. Montoya, et al, 32 N. Mex. 88, 251, Pac. 390	6, 22, 24
German Alliance Ins. Co. v. Lewis, 233 U. S. 389	10
Gulf Coronado & Santa Fe Ry v. Ellis, 165 U. S. 150	25, 26
Hauser v. North British Ins. Co., 206 N. Y. 455, 100 N. E. 52	6, 21, 24
Lawton v. Steele, 152 U. S. 133, 137	5, 9, 11
Liggett v. Baldridge, 278 U. S. 105	4-7
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32	25
Meyer v. Nebraska, 262 U. S. 390, 399	9, 11
Mississippi R. R. Commission v. Mobile & Ohio R. R., 244 U. S. 388, 390, 391	9
Morehead v. Tipaldo, 56 S. Ct. 918	4, 8
Norfolk & Western Ry. v. Public Service Com. 265 U. S. 70	5, 9
Northwestern Ins. Co. v. Fishback, 130 Wash. 490, 228 Pac. 516, 36 A. L. R. 1507	6, 22, 24
O'Gorman v. Hartford Fire Ins. Co. 282 U. S. 251	14
People v. Gillson, 109 N. Y. 389, 17 N. E. 343	6, 24
People v. Ringe, 197 N. Y. 143, 90 N. E. 451, 27 L. R. A. (N. S.) 528, 18 Ann. Cas. 474	6, 23, 24

TABLE OF CASES CITED—Continued

	PAGE
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389	25
Royster Guano Co., v. Virginia, 253 U. S. 412	25, 26
Schlesinger v. Wisconsin, 270 U. S. 230	25, 26
Schmidinger v. Chicago, 226 U. S. 578, 588	9
Smith v. Cahoon, 283 U. S. 553	12
Wisconsin, Minn. Etc. R. R. v. Jacobson, 179 U. S. 287, 297, 301	9
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522	4, 10
Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552	4, 10
Yu Cong Eng. v. Trinidad, 271 U. S. 500	5, 11

STATUTES CITED

Georgia Code, 1933, Title 56, Ch. 4	14
Georgia Code, 1933, 56-501	19
Georgia Laws, 1935, p. 139	1, 20, 29

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY AND W. M. FRANCIS, *Appellants*, vs. WILLIAM B. HARRISON, INSURANCE COMMISSIONER, *Appellee.*	No. 355

BRIEF FOR APPELLANTS

The decision of the Supreme Court of the State of Georgia now before this Court for review has not yet been officially reported.

Appellants have made the statement of jurisdiction required by Paragraph 1 of Rule 12.

STATEMENT OF CASE

This case involves the constitutionality of a portion of an Act of the General Assembly of the State of Georgia, approved March 26, 1935, published in *Georgia Laws* 1935, *p.* 139. The statute is printed as an appendix to this brief. The

particular part of the statute attacked as unconstitutional is that part of Section 1 quoted as follows:

> "No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the insurance commissioner. * * * The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally, and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies, however compensated."

The present suit does not attack the right of the State to require a licensed resident agent where policies of insurance are written in the State. It does attack the statute as in violation of the Fourteenth Amendment of the Constitution of the United States, in so far as it prohibits agents working on salaries for stock companies from acting as resident agents and being licensed as such. The issue arises in this way:

The Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, jointly, brought a suit for mandamus against William B. Harrison, Insurance Commissioner of the State of Georgia, to require the Insurance Commissioner to issue to Francis a license to act as resident agent for the Company. The petition for mandamus set out that the Company was duly authorized to issue insurance policies in Georgia, and had made an application to the Insurance Commissioner for a license for Francis to act as its resident agent. (R. p. 1). The application is in accordance with the procedure required by the *Act of* 1935. The petition set out that Francis was a salaried employee of the Company and that the Insurance Commissioner had refused him a license solely because of the fact that he was a salaried employee instead of being an agent working on commissions. The suit for mandamus thereupon set out the attack on the constitutionality of the Georgia statute in the respect heretofore

indicated (R. p. 2.) The grounds of attack will be stated later.

In answer to the mandamus nisi the Insurance Commissioner replied that it was correct that he had refused the license to Francis solely because Francis was compensated as an agent by salary instead of by commission. (R. p. 7 admitting par. 6 of petition R. p 2). The answer expressed the complete satisfaction of the Insurance Commissioner with respect to Francis' ability, training, etc., and his complete suitability to act as resident agent, except for the fact that he was a salaried employee. The answer then denied that the act was unconstitutional for any reason. The pleadings thus made the case turn exclusively upon whether or not the attack on the constitutionality of the statute was well founded.

The trial court held the act unconstitutional and issued the mandamus. (R. p. 12). Upon appeal the Supreme Court of the State of Georgia reversed the judgment of the trial court (R. p. 16), two Justices dissenting. The judgment of reversal in effect directs the trial court to deny the relief prayed for and left nothing open to it except the ministerial duty of carrying out the mandate. In this situation an appeal was allowed to this Court.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The assignments of error present two grounds why the Georgia statute, in the respect heretofore pointed out, is violative of the Constitution of the United States. (R. p. 51.) They may be stated as follows:

(1) The provision prohibiting salaried agents from acting as resident agents is arbitrary and capricious and bears no reasonable relationship to the public health, morals, welfare, or any other matter included within the familiar term "police power." Hence, it deprives both the company and the agent of property and liberty without due process of law, in viola-

tion of the Fourteenth Amendment of the Federal Constitution.

(2) In so far as the act discriminates against stock companies and their agents, and in favor of mutual companies and their agents, in the above requirement, it is likewise arbitrary and capricious and presents a classification bearing no reasonable relationship to the subject matter of the legislation. Hence, it violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

The two positions will be discussed separately under the general heading of—

1. "Due Process."
2. "Equal Protection Clause."

DUE PROCESS

Summary of Argument

1. The State cannot arbitrarily interfere with private business or impose unreasonable and unnecessary restrictions upon it. The State cannot arbitrarily abridge the liberty of the individual agent to contract to work with the security of a salary basis. Legislation imposing such restrictions, and abridging the liberty of contract, must have both a real and substantial relation to the public health, safety, morals, or some phase of the general welfare.

Liggett v. Baldridge, 278 *U. S.* 105.
Adair v. United States, 208 *U. S.* 161.
Coppage v. Kansas, 236 *U. S.* 1.
Adkins v. Children's Hospital, 261 *U. S.* 525.
Morehead v. Tipaldo, 56 *S. Ct.* 918 (not yet published in official reporter).

2. That insurance is a business affected with a public interest does not justify arbitrary and unreasonable restrictions on the relation between the company and its agents, or the method of paying compensation to such agents. The restric-

tions, to be valid, must bear some real and substantial relationship to matters within the domain of the socalled police power.

Norfolk & Western Ry. v. Public Service Com., 265 *U. S.* 70.
Burns Baking Co. v. Bryan, 264 *U. S.* 504.
Wolff Packing Co. v. Court of Industrial Relations, 262 *U. S.* 522.
Wolff Packing Co. v. Court of Industrial Relations, 267 *U. S.* 552.

3. Even where legislation is an exercise of the police power in the interests of the public generally, as distinguished from those of a particular class, it is a further constitutional requirement for its validity that the means are reasonably adapted to the accomplishment of the purpose. Arbitrary, unnecessary, and unreasonable, restrictions are void.

Lawton v. Steele, 152 *U. S.* 133.
Yu Cong Eng v. Trinidad, 271 *U. S.* 500.
(See cases reviewed pp. 525, et seq.)

4. The prohibition in the present statute against the use by a stock company, as a resident agent, of any one employed on a salary basis (and against any employee of a stock company being allowed to contract to act as resident agent on a salary basis, and being licensed as such) is purely arbitrary, and bears no reasonable relationship to any matter within the police power.

5. The attempt of the counsel for the appellee to find some connection between this restriction and the public welfare does not succeed.

6. The justification of the restriction in the statute asserted by the Supreme Court of Georgia cannot be sustained.

7. Certain State cases dealing with arbitrary restrictions made by statute as to the relationship between insurance com-

panies and their agents strongly support the view asserted by the appellant.

Hauser v. North British Ins. Co., 206 *N. Y.* 455, 100 *N. E.* 52.
Franklin Fire Ins. Co. v. Montoya, et al, 32 *N. Mex.* 88, 251 *Pac.* 390.
Northwestern Ins. Co. v. Fishback, 130 *Wash.* 490, 228 *Pac.* 516, 36 *A.L.R.* 1507.

8. The Georgia act does not serve any real public interest, but is intended to serve only to give a monopoly to agents working on commissions. This is not within the police power.

People v. Ringe, 197 *N. Y.* 143, 90 *N. E.* 451.
Hauser v. North British Ins. Co., supra.
People v. Gillson, 109 *N. Y.* 389, 17 *N. E.* 343.
Franklin Fire Ins. Co., v. Montoya, et al, supra.

I

Constitutional Right to Be Protected from Arbitrary Interference With Private Business or Liberty to Contract.

The principles to be applied in determining whether any restrictive legislation is legitimately within the police power or goes beyond the same and amounts to a denial of due process of law are now definitely settled by the decisions cited in paragraph one of the foregoing summary. There are, of course, presumptions in favor of the validity of all legislation. The Court will not lightly interfere and declare an act void. Nevertheless, if upon a careful consideration the Court is forced to the conclusion that the restriction set up in the statute is arbitrary and capricious and bears no reasonable relationship to the public health, morals, or welfare, then the statute must yield to the fundamental right of property and liberty guaranteed by the Federal Constitution.

From the standpoint of the Company the following statement is in point:

"The business of a foreign corporation is property, and the corporation a 'person,' within the meaning of the due process and equal protection clauses of the Fourteenth Amendment.

" * * *

"A State cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'

" * * *

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. * * *"

Liggett Co. v. Baldridge, 278 *U. S.* 105.
Also, see cases cited in opinion.

From the standpoint of the agent, the right to earn a living in a lawful occupation, and to make his own contracts therefor, is a constitutional right and cannot be arbitrarily or unreasonably restricted under the guise of police power.

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * *"

Adair v. United States, 208 *U. S.* 161.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of

personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."

Coppage v. Kansas, 236 *U. S.* 1.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. * * *"

Adkins v. Children's Hospital, 261 *U. S.* 525.

Another case to be noted here is *Morehead v. Tipaldo*, 56 S. Ct. 918, in which the Court held invalid a law respecting minimum wages for women in New York.

2

Business Affected With a Public Interest Not Subject to Arbitrary and Unreasonable Restrictions.

It is true that insurance is a business affected with a public interest, but this does not justify arbitrary and unreasonable restrictions. The applicable principle in the decision of the

Supreme Court in the case of *Norfolk & Western Ry. v. Public Service Commission*, 265 U. S. 70, is stated with reference to railroads (and is equally applicable to other companies affected with a public interest) in the following language, at page 74:

> "The State in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them. But its power to regulate is not unlimited. It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business. *Mississippi Railroad Commission v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 390, 391. The validity of regulatory measures may be challenged on the ground that they transgress the Constitution; and thereupon it becomes the duty of the Court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary, and void. *Wisconsin, Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 287, 297, 301; *Burns Baking Co. v. Bryan*, 264 U. S. 504. * * * "

In the case of *Burns Baking Co. v. Bryan*, 264 U. S. 504, at page 513, the Court says:

> "Undoubtedly the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. *Schmidinger v. Chicago*, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Lawton v. Steele*, 152 U. S. 133, 137; *Meyer v. Nebraska*, 262 U. S. 390, 399. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the

protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. * * * "

Wolff Packing Co. v. Court of Industrial Relations, 262 *U. S.* 522, *and Wolff Packing Co. v. Court of Industrial Relations*, 267 *U. S.* 552, are cases of importance at this point. Both cases dealt with a Kansas statute requiring compulsory arbitration of labor disputes. The first case held this unconstitutional as applied to a dispute over minimum wages. The second made the same holding as to a dispute over hours of labor. Both cases were unanimous decisions and rest on the fundamental constitutional right of companies and adult individuals to make their own contracts with respect to compensation for labor and services. The importance of the decisions as bearing on the present case grows out of the following:

The plaintiff was a meat packing company and it was argued that the meat packing industry had become so vital to the public that the business had become within the category of businesses affected with a public interest. The court recognized this to be true, but denied that this justified legislation forcing a company to agree to a certain schedule of pay. The Chief Justice analyzes the situation with respect to businesses affected with a public interest on *pages* 535 *et seq. of the report in* 262 *U. S.* Such businesses he states, fall into three categories, (1) those exercising a public grant of privileges, such as railroads and the like; (2) those which as a matter of legal history have been so classified, such as innkeepers, cab drivers, and certain other industries; and (3) "businesses which though not public at their inception may be fairly said to have risen to be such, and have become subject in consequence to some governmental regulation." He puts meat packing in the third class. He also places insurance in this third class, since he cites as one of the cases in the third class *German Alliance Ins. Co. v. Lewis*, 233 *U. S.* 389. The Court rules with respect to businesses in the third class (which as just pointed out includes insurance) that

the fact that the business is somewhat affected with a public interest does not authorize the State to fix the pay of employees, and that the effort to do so infringes constitutional rights.

3

Means Adopted by Legislation Must Not Be Arbitrary and Unreasonable.

In *Lawton v. Steele, supra,* this Court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The foregoing is quoted with approval in *Yu Cong Eng v. Trinidad,* 271 *U. S.* 500, *on p.* 525. On the next two pages the Court reviews certain other cases to the same effect. The principle to be followed is definitely settled. Even where the asserted end of the legislation is within the police power it is still a further requirement that the means adopted must have some reasonable relation to that end. It is "established doctrine" that the liberty guaranteed by the Federal Constitution "may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

Meyer v. Nebraska, 262 *U. S.* 390.

Georgia Statute Arbitrary and Without Reasonable Relation to Any Purpose Within Competency of State.

This is the crux of the case.

There can be no doubt that the principles of constitutional law heretofore set out are settled, and are the basis on which the case must be decided. Even in cases where this Court has divided the difference of opinion has not been with respect to the applicable principle, but has been as to whether the particular statute violated the principle. In each case, when this challenge is made, the final determination of the court must be on whether the particular state law is or is not arbitrary, and does or does not bear some reasonable relationship to a subject within the competency of the State to legislate.

The question is adequately presented by the provisions of the statute itself, in the light of those matters so familiar as to be within the judicial cognizance. No complicated economic or sociological facts are here involved. Where the arbitrary and capricious character of a statutory regulation can be shown from the regulation itself, in the light of general knowledge of the business in question, then no factual inquiry is necessary, but the statute will be held invalid without taking proof. (For example, see *Smith v. Cahoon*, 283 *U. S.* 553.) The Supreme Court of the State of Georgia was correct in assuming that it had adequate information on which to determine the question. We insist, however, that the determination of the majority of that court was not correct.

It is important to have the full statutory scheme in mind. The following features of the act are to be noted:

(1) No licensed insurance companies of the kinds covered by the act shall issue any policy on a risk in Georgia except through a resident agent licensed by the Insurance Commissioner. Sec. 1, first paragraph.

(2) The Insurance Commissioner must examine all agents to ascertain that they possess the moral and financial standing, and that they have knowledge of the business, law, and practices necessary to qualify them and to meet the requirements of the act. Sec. 1, second paragraph.

(3) Provision is made requiring the resident agents to keep records of insurance written, and if required by the Commissioner to furnish him a certified statement of such other information as may be required by the Commissioner to aid in the collection of all premium taxes in this State. Sec. 1, first paragraph.

(4) No salaried agent of a stock company shall act as resident agent. Sec. 1, first paragraph.

(5) But mutual companies may use salaried agents as resident agents. Sec. 1, first paragraph.

(6) The full normal commission shall be paid to the resident agent, but he may divide, to the extent of not over fifty per cent, with another licensed agent on business originated by such other licensed agent if a non-resident of the State. Sec. 1, first paragraph.

(7) No contract bond shall be issued by any surety company except through a resident agent in the county in which the work is located, if the company has an agent resident in that county. Sec. 1, first paragraph.

It is equally important to bear in mind that the provision of the statute now under attack is in no sense a provision regulating the amount of compensation to be paid to agents for writing insurance. The provision requires all agents to be paid by commissions, but makes no limit on the amount of commissions which may be paid them. It prohibits all agents from being paid by salaries without the slightest regard to how reasonable the salaries might be. It has, therefore, no relation to any effort on the part of the State to prevent excessive expenditures by insurance companies as agency costs.

What has just been said completely distinguishes this case from *O'Gorman v. Hartford Fire Ins. Co.*, 282 *U. S.* 251, on which opposing counsel place their chief reliance. The O'Gorman case marks the furthest this Court has ever gone in upholding legislative restrictions in this field. That it is a border line case is conclusively shown by the fact that the Court divided five to four. The question presented in the O'Gorman case was a statute limiting the amount of commissions which could be paid. It may be admitted that there is some remote connection between excessive disbursements for agents' commissions and the rates which insurance companies must charge. Inasmuch as the State undoubtedly has the right to regulate insurance charges the majority of the Court felt that a limitation against excessive agency costs was a means reasonably adapted to accomplish this end. If the Georgia statute now before the Court were a statute to prevent excessive agency costs and the means were reasonably adapted to accomplishing that end, then the ruling of the majority of the Court in the O'Gorman case would be relevant. As pointed out, however, the present statute has no such purpose or effect. The size of the commissions and the size of the salaries are all completely irrelevant so far as the present statute is concerned.

We here summarize the situation: Georgia, like every other state, requires insurance companies to be licensed, after adequate examination, etc., before any of them may write insurance in the State.[1] The present statute contains full provision for the examination of all agents before any agent may be licensed to act as a resident agent. It contains full provision for requiring agents to keep records and make required reports. It sets up no upward limitation on the amount that may be paid for commissions for writing insurance or salaries of agents who are used, in whole or in part, to write insurance. But it does contain the unqualified

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1. Ga. Code 1933, Title 56, Ch. 4, gives in detail the provisions for examining and licensing insurance companies to do business in the State.

prohibition against a salaried agent of a stock company acting for that company as its resident agent.

Such a restriction is an arbitrary interference with the right of the company to conduct its business. Whether an insurance company pays its resident agents by commissions or by salaries (or some one way and some another) does not relate to the public health, morals, welfare, or anything within the domain of the so-called police power.

We stress the fact that the present statute infringes not only the rights of the companies but also the rights of individuals who desire to contract to act as resident agents on a salary basis. The fundamental right of an individual to earn a living, free of arbitrary and capricious restrictions, is the very essence of constitutional liberty. We are not here concerned with those cases where it is claimed that a class, because of economic pressure, needs to be protected from contracting away its rights for an inadequate consideration. The conflicting views on this question are, of course, familiar, but no such problem is involved in the case at bar.

From the standpoint of the constitutional right of the agent to contract for a salary, the situation is simply this: If he prefers to have the security and certainty of a salary contract (many men would prefer such security) and the company is willing to give him such a contract, then the agent may assert, as the one who is now an appellant does assert, a constitutional right to sell his services on this basis. To justify a legislative interference therewith there must be shown some real and substantial relation between the agent working on a salary and the public health, morals, or welfare. A fanciful or imaginary connection is not enough.

We conclude this branch of the discussion with an illustration of the practical working of the statute from the standpoint of the company. What has just been said from the agent's standpoint with regard to an agent who desires to make a contract for a secure salary with a company willing to grant it is an adequate illustration from the agent's standpoint.

Let us assume that a salaried agent of an insurance company doing business in the State of Georgia—perhaps a branch manager, or one of his assistants, or the like—negotiates an agreement for a contract of insurance. It is undoubtedly within the judicial cognizance that this does happen. The company has passed all requirements of Georgia law to be licensed in Georgia; the branch manager is capable of passing all the requirements of this statute as to the qualification that an agent should possess; everything is ready for the policy to be issued, and no insurance broker or agent on commissions has had any connection with the matter. Just at this point, however, the restriction in the statute would come into operation. If enforced it would mean that the branch manager, or whatever salaried agent was used, could not issue the policy which he had negotiated. According to the Georgia statute he would be forced at this point to call in an insurance broker, or agent on commissions, to sign or issue the policy, *and would be forced by the terms of the statute to pay the agent on commissions the full normal commission for a transaction with which such agent had had absolutely no connection.*

Since Georgia requires the subject matter of a statute to be stated in its title, this statute might very well have added as a part of its title "to enforce the payment of full commissions to insurance brokers on business with which they have had no connection." This appears to be the real purpose, and certainly the undoubted effect of the portion of the statute under consideration.

5

Attempt of Appellee to Find Connection Between Restriction and Public Welfare Does Not Succeed.

The original answer filed in this case, in dealing with the constitutional questions, devotes most of its space to asserting the difference between stock companies and mutual companies. This bears on the further contention made by us, under the

equal protection clause of the Federal Constitution, to be discussed in a later division of this brief. In so far as the original answer attempts to find a justification for the prohibition against salaried agents of stock companies acting as resident agents, it is on the grounds, (1) that it would aid the State in the collection of its premiums tax to have all agents on a commission basis, and (2) that it would secure as agents men of higher character and ability. (R. p. 9.) These two assertions appear to be set up really as bearing on the same matter of collecting taxes on premiums. The answer asserts that where salaried agents are used to issue policies they are liable to be mere clerks who do not keep records in Georgia, and therefore to force all policies to be issued through commissioned agents in this State would aid the State in collecting its premiums tax, because these latter agents would be more likely to have records in this State. This, the answer says, constituted "the evil at which the General Assembly aimed in the passage of the act now under consideration."

We believe that at the time this answer was filed the able Assistant Attorney General of the State of Georgia, having charge of the defense of the case, must have overlooked the fact that the statute now before the Court itself requires all agents licensed as resident agents to keep just such records as may be needed for the collection of the premiums tax, and to report thereon to the Insurance Commissioner; and that the statute itself gives the Insurance Commissioner plenary powers to examine agents as to their character, competence, education, etc. Hence, no salaried agent could be licensed as a resident agent or retain his license as such, unless he did keep the records referred to, and did demonstrate his fitness in an examination by appropriate State authorities. The discrimination in this statute against salaried agents is that even when these agents comply with the law and keep records, and by State examination are proved to be satisfactory, nevertheless, they cannot act as resident agents if paid by salary.

If these provisions about examining and record-keeping

had not been in the statute it, nevertheless, would have been fanciful to suppose that the method by which a resident agent was paid, whether by commission or salary, had any real and substantial relation to either the competency of the agent or the character of records kept. The aggregate amount of compensation might conceivably have some such remote relation, but that is a matter which in this respect is not dealt with by the statute. The method of payment, however, could not have any such relation. Where, however, the statute has already protected against both of these features by separate and independent provisions which furnish complete protection, and then goes forward and adds this prohibition against salaried agents who meet all the requirements of the statute acting as resident agents, it becomes as arbitrary and unreasonable as any statute ever presented to this Court.

For a valid exercise of the police power it is necessary not only that it be exercised in the interest of the public generally, as distinguished from a particular class, but also that the means adopted shall not be arbitrary and capricious.

The Insurance Commissioner amended his answer in the trial court to set up a third reason why it was contended that this provision against salaried agents acting as resident agents was a reasonable exercise of the police power. (R. p. 10). That reason is about this: Agents on salaries will be interested chiefly, it is said, in the companies that employ them, whereas agents on commissions will be interested largely in the insured from whom they receive the business; and this, it is said, is a reasonable thing to be required in the public interest.

To have any substance counsel's argument here must mean that situations arise where it is important whether agents will be loyal chiefly to the company employing them, or chiefly loyal to the opposite party, and that this statute would tend to prevent the chief loyalty being to the companies for which the agents were acting. If the argument does not mean this it is meaningless. If it does mean this then the

contention really is that it is competent for the legislature to prohibit insurance companies using as resident agents those whose chief loyalty is to the companies they represent. Stated bluntly, the position is shocking. It is even more shocking when we bear in mind that under express statute in Georgia the agent is in law always treated as the agent of the company alone, with all of the consequences this entails. *Code* 1933, 56-501.[2]

The final basis, therefore, on which opposing counsel attempt to justify the statute presents this contention: That the State of Georgia, having provided that the agent must for all purposes be treated in law as the agent of the company alone, may then competently pass another statute to prevent the company employing agents in a way which will secure their undivided loyalty.

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2. "Any person who shall solicit in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other State or foreign Government, or who shall take or transmit, other than for himself, any application for insurance or any policy of insurance to or from such company or agent of the same, or who shall advertise or otherwise give notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act shall be done or the risk shall be taken."

6

Connection Asserted by the Supreme Court of the State of Georgia Between Restriction and Public Welfare Not Well Founded.

The Supreme Court of the State of Georgia appears not to have accepted any of the attempted justifications of this statute asserted by opposing counsel and just considered. That court devotes the major part of its opinion to a presentation of principles of constitutional law which, as abstract principles, we do not dispute. A large part of it is devoted to discussing the difference between stock and mutual companies. When it comes to the specific question of why it is claimed there is a reasonable connection between the prohibition against salaried agents acting as resident agents, and the public welfare, the court deals with the matter very briefly, and assigns only one ground for its position. (R. p. 37). That ground is that the court knows judicially that the agents in most of the small communities in Georgia are on a commission basis, and that there is not enough business there to support agents on a salary basis. Hence, the court says, the statute may be justified because if the company did not employ these agents on a commission basis the communities would be without insurance agents.

This is the only reason assigned by the Supreme Court of the State of Georgia as to why the public welfare is in any way connected with this restriction. The condition with respect to commissioned agents in small communities in the State which the Supreme Court of the State of Georgia knows judicially, and finds satisfactory, was a condition that existed before the *Act of* 1935 was passed. As this condition existed before that act, it is not dependent on the act for its continuation, but would continue to exist if the *Act of* 1935 in this respect were held unconstitutional. Invalidating the act will in no way prevent insurance companies from employing agents on commissions in the small towns. It will merely permit the companies to employ some agents on salaries

where they deem it advisable. The non sequitur in the position of the Supreme Court of the State of Georgia is involved in the implied assumption that if this act were held unconstitutional the companies would be prohibited from employing commissioned agents, which, of course, is not the case.

We have now examined every reason that has been assigned by the State authorities, either the Attorney General and his assistant, or the Supreme Court of the State of Georgia, as to why it is claimed there is any connection whatever between the prohibition against salaried agents acting as resident agents, and the public health, morals, welfare, or any other matter within the so-called police power. It is obvious that the supposed connections prove, upon examination, to be wholly without merit. There is no real and substantial relation between this restriction and the public health, safety, morals, or welfare. Its arbitrary character is apparent on its face; but the lack of any such real and substantial connection with the public welfare is demonstrated by the complete failure of anyone to imagine and suggest any connection that will stand examination.

7

Cases Dealing Specifically With Insurance Agent Statutes.

Hauser v. North British & Mercantile Ins. Co., 206 *N. Y.* 455, 100 *N. E.* 52, holding void a statute restricting insurance brokers' licenses to persons engaged exclusively in that occupation, or as an adjunct to a real estate business. The court says:

> "It is evident from a reading of the provisions of this added section of the insurance law, that it was the purpose of the legislature to confine the business of the insurance agent, or broker, mentioned to those who should make that their principal business, or who should be real estate agents, or brokers. That was made a

condition of the right to pursue the business. We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents, and fitness of character, and be a reasonable enough precaution in the public interest. But the legislature has prescribed in this statute a condition for the issuance of the license which is a purely arbitrary restriction. There is no good reason, and no public interest can conceivably be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged. * * * "

Franklin Fire Ins. Co. v. Montoya, et al, 32 *N. M.* 88, 251 *Pac.* 390, holding a statute prohibiting more than one agent with a license in a town to be arbitrary and unconstitutional. The court says:

"* * * It may be conceded for the purposes of this case that constitutional provisions intended to preserve the rights of individual citizens may sometimes be forced to yield to the public welfare. It should first appear, however, that it is the public welfare which is involved, rather than the interests of a favored few."

Northwestern National Ins. Co. v. Fishback, 130 *Wash.* 490, 228 *Pac.* 516, 36 *A. L. R.* 1507, holding a statute limiting the number of agents which an insurance company may appoint in any locality void for similar reasons. The court says:

" * * * We cannot but feel that the legislature had in view no welfare of the public, but that this legislation is an attempt to monopolize the business of writing insurance. * * * "

Further, the court says:

"Authorities might be multiplied until the perusal of them would become exhausting, to the effect that in any of these matters, where the legislature is interfering with lawful business, that the interference must have some fundamentally sound reason back of it. * * * *"

8

The Georgia Act Is Obviously Intended to Serve Solely the Interests of Agents Working on Commissions. Cases Calling Attention to Ulterior Purposes Shown in Statutes.

There is one group that will be served by this Georgia statute, namely, the insurance brokers or agents working on commissions. We have already pointed out in another part of this brief that it will force the payment to them of commissions on business with which they have had no connection. This is apparent merely from a study of the statute itself. There are certain State cases which should be considered briefly in this connection.

These are decisions which, in determining whether statutory restrictions are arbitrary or not, have given weight to the ulterior purpose apparent from the face of the statute; that is to say, to the purpose apparent in the statute by necessary inference, not so much to accomplish anything in behalf of the public welfare, but to handicap and restrain arbitrarily and unnecessarily one class of citizens for the benefit of another class.

People v. Ringe, 197 *N. Y.* 143, 90 *N. E.* 451, dealt with a statute putting certain unreasonable restrictions on those seeking licenses as undertakers. The court says, at *page* 454:

"We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals, and welfare of the state had much less

influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."

Hauser v. North British & Mercantile Ins. Co., supra, has already been pointed out. On the point now under consideration the court says:

"* * * As it was intimated below, following the suggestion in *People v. Ringe,* 197 *N. Y.* 143, 90 *N. E.* 451, 27 *L. R. A.* (*N. S.*) 528, 18 *Ann. Cas.* 474, the legislation now in question must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. * * *"

People v. Gillson, 109 *N. Y.* 389, 17 *N. E.* 343, held unconstitutional a statute putting certain unreasonable restrictions on competitive methods in connection with the sale of food. After stating the fundamental right of liberty to earn a living, subject only to restrictions in behalf of the public welfare, the court says, at *page* 345:

"* * * It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing, or producing fields. * * *"

The same idea is expressed in *Franklin Fire Ins. Co. v. Montoya, supra,* and *Northwestern National Ins. Co. v. Fishback, supra.*

EQUAL PROTECTION CLAUSE

In discriminating against stock companies and their agents in favor of mutual companies and their agents, the statute also violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The discussion under this head can be shortened in view of the presentation under the head of Due Process. It will not be necessary to repeat here the analysis of the act which has heretofore been given.

Summary of Argument

1. While classification is not prohibited it must, nevertheless, be reasonable and not arbitrary. Mere difference is not enough; but the difference upon which the classification is based must bear some reasonable relationship to the purposes of the legislation.

Louisville Gas & Elec. Co. vs. Coleman, 277 *U. S.* 32.
Quaker City Cab Co. vs. Pennsylvania, 277 *U. S.* 389.
Royster Guano Co. vs. Virginia, 253 *U. S.* 412.
Air-Way Corp. vs. Day, 266 *U. S.* 71.
Schlesinger vs. Wisconsin, 270 *U. S.* 230.
Gulf Coronado and Santa Fe Ry. vs. Ellis, 165 *U. S.* 150.

2. The difference between stock companies and mutual companies is admitted, and would justify classification for some purposes. It is not, however, a difference which bears any reasonable relationship to the question of how their agents are paid.

1

Classification Must Bear Some Reasonable Relationship to Purpose of Legislation. Mere Difference Not Enough.

An elaborate review of precedent is not necessary. The late decisions of this Court in *Louisville Gas & Electric Co. v. Coleman*, 277 *U. S.* 32, and *Quaker City Cab Co. vs. Penn-*

sylvania, 277 *U. S.* 389, have reviewed the matter fully. We quote from the first of those cases as follows:

> "The classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 253 *U. S.* 412, 415; *Air-Way Corp. v. Day,* 266 *U. S.* 71, 85; *Schlesinger v. Wisconsin,* 270 *U. S.* 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf Coronado and Santa Fe Ry. v. Ellis,* 165 *U. S.* 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

2

Difference Between Stock Companies and Mutual Companies Bears No Relation to How Agents Paid.

Undoubtedly there is a difference between a mutual company and a stock company, but mere difference is not enough.

Admittedly, this difference between the two types of insurance companies is such a difference as may be made the basis of a classification provided always the subject-matter of the legislation is one to which this difference sustains some reasonable relation. Hence there are cases which could be cited that have authorized a classification between stock companies and mutual companies where the regulation of rates of insurance is involved. Obviously, the difference between the two types of companies does bear a relationship to the matter of rate regulation, since in mutual companies the earnings on

high rates are merely pro-rated back to the members who are the same individuals who have paid the rates.

However, these cases, authorizing this classification for this purpose, are in no sense authority for the view that the difference between mutual and stock companies authorizes a classification for all purposes of legislation; and no case can be found which sustains such classification for a purpose similar to that now before the Court.

As stated, we do not repeat the analysis of the statute and the exposition of its purposes, which have heretofore been given under the head of due process. We do ask the Court to bear that discussion in mind at this point because we believe when the purpose of this statute is clearly borne in mind it becomes perfectly obvious not only that the whole matter is unreasonable, as heretofore pointed out, but that there is also no difference between stock companies and mutual companies from this standpoint. The unearned commissions which this statute forces to be paid to commissioned agents on business they have not written in the one instance would come out of the pockets of the stockholders of a stock company; and in the other instance (if it applied to mutual companies) would come out of the policyholders of the mutual companies. We are unable to see why it is reasonable for the legislature to pay unearned commissions at the expense of stockholders, but would be unreasonable for it to pay such commissions at the expense of policyholders. It is an arbitrary confiscation of property interests in either case, and the difference between stock and mutual companies has no relationship to the ends accomplished by the statute.

From the standpoint of the classification between the agents of the two companies, the arbitrary nature of the classification is apparent on its face.

If we take the most charitable view possible of the statute and treat it as merely requiring a certain method of compensating agents, it is not apparent why one method of compensation should be prohibited to stock companies and per-

mitted to mutual companies. The difference in the method required is not only arbitrary, as heretofore pointed out, but, furthermore, the discrimination as between the types of companies and their agents rests on a difference which has no reasonable relationship to the legislative purposes. The lack of such relationship is not susceptible of elaborate argument. It simply does not exist. And when that has been stated the subject has been covered.

No reasonable connection between the difference in the two types of companies, and the method of paying agents, has been pointed out by counsel for the appellee, nor is set out in the opinion of the Supreme Court of the State of Georgia.

Respectfully submitted,

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APPENDIX

Act of General Assembly of Georgia, approved March 28, 1935. Georgia Laws 1935, page 139:

"An Act to amend chapter 56-5, entitled, 'Agents and Solicitors,' of the title 56, 'Insurance,' of the Code of Georgia of 1933. The said section of the Code as hereby amended is Section 56-508, and new sections are to be added to the said Code. The said Code being amended to make the provisions of the same applicable to the business of writing Fidelity and Surety Bonds in this State; to provide for the licensing and examination of Agents for license; to provide for the establishment of Agent's Association; to prevent the writing or acceptance of such insurance contracts and/or bonds issued by non-admitted insurers; to provide penalties, and for the enforcement thereof for the violation of any of the provisions hereof; to provide for the repeal of any law or laws in conflict herewith; and for other purposes.

"Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, chapter 56-5, entitled 'Agents and Solicitors,' of title 56, 'Insurance,' of the Code of Georgia of 1933, is hereby amended as follows:

" 'Section 1. Section 56-508, relating to the licensing of agents by the Insurance Commissioner, is stricken and in lieu thereof there is substituted the following section:

" '56-508. License of Agents by Insurance Commissioner. No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the Insurance Commissioner: Provided that no contract bond shall be issued by any company, except through an agent, resident of the county in which the work under contract is located, if the company has an agent, resident in the county in question. The full commission thereon (meaning thereby the commission paid for the

production of business by him), shall be paid to such resident agent. Provided, however, that such resident agent may pay a commission on business placed with him by another duly licensed resident agent, and, provided further, that such resident agent may pay a commission not exceeding fifty per centum of the regular commission allowed resident agents upon the issuance of such policies or contracts, to a duly licensed non-resident on any business originated by such non-resident. This section shall not apply to policies covering property in transit while in the custody of any common carrier or to rolling stock of any common carrier, nor to cotton insurance issued under a per bale reporting form of coverage. The words "resident agent" as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies however compensated. Nothing in this section, however, shall be construed to relieve from license requirements any State or Special Agent, or traveling and/or salaried employee, who performs any of the acts, services or things mentioned in section 56-501 of title 56 Code of Georgia, in behalf of any insurer or agent of the same. Such resident agent shall keep a true record of all policies and/or bonds thus issued through him on business originated by such licensed non-resident and shall furnish, if requested by the Insurance Commissioner, a verified statement showing the risk covered, amount of insurance and premium involved, and such other information as may be required to aid the said Commissioner in the collection of all premium taxes due in this State and the enforcement of the provisions of this Act as amended hereby. No person except as hereinafter provided shall be licensed as an insurance agent except upon the application of a company authorized to do business in this State, which said application shall be accompanied by a certificate signed by an executive officer of such company and certifying that after inquiring into the facts to the best knowledge, judgment and belief of such company, such person is of

good character, is now a bona fide resident of the State of Georgia, and in good faith intends to remain as such resident for a period of twelve (12) months or more from the date of the filing of said application, and is or expects to become bona fide engaged in the business of an insurance agent (as defined in this Act), that he has such moral and financial standing as to make it probable that he can carry on such an agency without detriment to the public, that he expects bona fide to solicit and serve the public generally and not to procure the license chiefly for the purpose of getting a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested or with which he is connected, and that he has such knowledge of the business and of the law and practices governing and relating to the same as will enable him to carry on the business in a competent manner and without detriment to the public.

"'56-508 (a). Examination by Commissioner. After receipt of application for such agent's license in due form (and if said application is from a first-time applicant for license, it shall be accompanied by an examination fee of $10.00, to be paid by agent), it shall be the duty of the Insurance Commissioner, or his deputy or any person he may designate to represent him, within a reasonable time and in a place reasonably accessible to the applicant, in order to determine the trustworthiness and competency of an applicant, for a license, to subject each first-time applicant for license, and, if he deems necessary, any applicant for renewal of license, to a personal written examination as to his or her competency to act as such agent in the community which he intends to serve. When it is shown from such application and examination that the applicant is intending in good faith to act as an insurance agent or solicitor and to be principally engaged in the insurance business and is of good character, is now a bona fide resident of the State of Georgia, and in good faith intends to remain as such resident for a period of twelve (12) months or more from the date of the filing of said application, and is or expects to become bona fide engaged in the business of an in-

surance agent (as defined in this Act), that he has such moral and financial standing as to make it probable that he can carry on such an agency without detriment to the public, that he expects bona fide to solicit and serve the public generally and not to procure the license chiefly for the purpose of getting a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested or with which he is connected, and that he has such knowledge of the business and of the law and practices governing and relating to the same as will enable him to carry on the business in a competent manner and without detriment to the public, and is worthy of a license, the Insurance Commissioner shall issue to the applicant a license to transact business in this State as an insurance agent or solicitor. Such license shall expire annually on the first day of March unless sooner revoked for cause by the Insurance Commissioner: Provided, that no agent holding a license at the time of the enactment of this Act shall be deemed a first-time applicant.

"'56-508 (b). Who may be appointed as agent. Any company lawfully authorized to transact business in this State may contract with and appoint as its representative in this State any person as its agent who holds an unexpired agent's license issued under the provisions of this Act, by filing with the Insurance Commissioner a certificate showing the name and address of such appointee and by paying such fee as is provided by law.

"'56-508 (c). Temporary license. In the event of the death or the inability further to act, of an agent holding a certificate of authority from any company, where no other agent in the co-partnership, association or corporation is authorized to represent such company, the Insurance Commissioner may issue a temporary license to another person enabling such other person to represent any such company upon an application being made in conformity with Section 2 and the additional information required by this section. Such temporary license shall continue only until the license is afforded an opportunity of taking the examination provided in Section 2 above.

"'56-508 (d) Renewal of licenses. Renewal of all expiring licenses shall be upon application in writing, subject to the conditions of examination of such applicants as set forth in Section 2 for renewal of license, and upon payment of the annual insurance agent's occupational tax. Provided that should the Commissioner require an examination for renewal of such license, no examination fee shall be required.

"'56-508 (e). Agency associations. Associations may be formed or maintained by all or any class of the regularly licensed insurance agents referred to in this Act for the purpose of maintaining the ethics of the profession and forwarding their aims. It shall be lawful for such associations to make and enforce by-laws deemed by such associations needful to carry out such purposes.'

"Sec. 2. Be it further enacted, that there shall be added to the said chapter 56-5, relating to 'Agents and Solicitors,' of title 56—Insurance, of the Georgia Code, after Section 56-522 thereof the following new sections:

"'(1) No corporation, individual, firm or association not licensed in Georgia to transact the business of a fire and casualty insurance, or the writing and issue of fidelity and surety bonds, shall so engage in such business within the limits of this State; nor shall any person act as agent for any company, individual, firm, or association engaged in the writing of such business, unless such person has himself first received a license from the Insurance Department to represent a company duly authorized in the State. Penalty for the violation of this provision on the part of the corporation, individual, firm or association illegally engaged in the writing of business in this State as herein provided shall be $1,000 for the first offense and $2,000 for each additional offense. It shall be deemed a misdemeanor for any person to act as agent for any such company without such person having first received a license as provided herein.

"'(2) No individual, firm, corporation or association residing or doing business in this State shall accept a policy

of fire or casualty insurance, or fidelity or surety bond issued by a non-admitted company, individual, firm or association in violation of the preceding section, unless such individual, firm, corporation, or association shall immediately report the fact to the Insurance Commissioner, giving the name of the company issuing the policy or contract, stating its amount and the premium paid thereon, and shall thereupon pay to the Insurance Commissioner the license fee properly chargeable against such company if it were admitted to the State, and the premium tax chargeable under the General Tax Act upon the amount of premium so paid. Failure so to report and pay the license fee and premium tax herein mentioned shall subject such individual, firm, corporation or association to a penalty of 10% of any such sum as may be paid as indemnity by such insurer to the assured in the event of a loss. Such penalty may be collected upon the establishment of such fact in a civil suit by any informer in any court having jurisdiction thereof, one-half of the amount of such recovery to go to the informer and the other half to be paid to the Insurance Commissioner to be placed by him in the general funds of the State; or the same may likewise be recovered upon the establishment of such fact in a civil suit brought in the name of the State of Georgia by the solicitor-general of the circuit where such act may have been done, in which event the solicitor-general shall be paid 10% of the amount received.

"'(3) If any licensed company shall violate any of the provisions of this Act as hereby amended, the Insurance Commissioner may, upon his own motion, and shall upon sworn information in writing signed by a citizen of this State and filed with the Commissioner, make due inquiry, in the form and manner hereinafter provided, into any such alleged violation of the provisions of this Act, and upon proof being presented, the sufficiency of which shall be determined by him, the Commissioner shall assess a penalty of one hundred ($100.00) dollars for each offense. No penalty as herein provided shall be imposed upon such alleged violator until a written copy of such charges, together with a citation, requiring appearance before the Insurance Commissioner at the

State Capitol on a day certain to be fixed by the Insurance Commissioner, at a time not less than twenty (20) days after the service of such citation and copy of charges, then and there to show cause in writing why such penalties should not be inflicted. Service of such citation and copy of charges shall be made upon its Attorney-in-Fact designated to acknowledge or receive service in the manner provided by law for such service.

" 'For the purpose of such inquiry the Insurance Commissioner is hereby empowered to summon witnesses, so as to enable him to make a determination of the merits, provided that any order of the Insurance Commissioner suspending or revoking any license shall be subject to an appeal on the same terms and in the same manner and form as is now provided by law for appeals from the decisions of the Courts of Ordinary of this State.

" '(4) Any penalty or penalties herein provided for shall be in addition to and cumulative to any other penalty or penalties heretofore provided for by law.'

"Sec. 3. Be it further enacted, that it is specifically declared to be the intention of the General Assembly to enact each and every one of the sections herein contained separately and independently of each other; and therefore, in the event that any section of this Act shall be declared to be void or unconstitutional by any court of competent jurisdiction, such decision shall not affect the remainder of this Act or any other section thereof.

"Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with any of the foregoing provisions of this Act shall be, and the same are, hereby repealed."

Approved March 28, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY AND W. M. FRANCIS,
Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER.

REPLY BRIEF FOR APPELLANTS.

HAROLD HIRSCH,
MARION SMITH,
Counsel for Appellants.

INDEX.

Cases Cited.

	Page
Adkins v. *Children's Hospital*, 261 U. S. 525	6
LaTourette v. *McMasters*, 248 U. S. 465	8
Liggett v. *Baldridge*, 278 U. S. 105	2
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266	3
Meyer v. *Nebraska*, 262 U. S. 390	2
O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251	3
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389	2
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402	10

Statutes Cited.

Code of Georgia, Sec. 56-218	3
56-9903	3

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REPLY BRIEF FOR APPELLANTS.

The brief for the appellee introduces certain newly discovered reasons as to why the Georgia statute under attack bears (it is claimed) some real and substantial relation to matters within the domain of the police power. We file a reply brief mainly to reply to these newly discovered arguments. We note first, however, that there is no real difference between us as to the principles of constitutional law to be applied. Opposing counsel say:

> "We recognize the oft asserted principle that liberty of contract is one of the fundamental rights guaranteed by our Constitution, and that a State may not deprive a citizen of the United States of such privilege, or impair it, by the enactment of arbitrary or capricious law."

We claim no more than this.

Where the act in question bears a real and substantial relation to public health, morals, welfare, etc., then we concede that opposing counsel are entirely correct in saying that the legislative body is itself the exclusive judge of the wisdom of the legislation. But it must always be borne in mind that this relation of the statute to the public health, morals, or welfare must be real and substantial. A fanciful or imaginary relation is not sufficient. The means adopted must be reasonably suited to the ends sought. Wholly unnecessary restrictions cannot be applied. See cases cited and discussed in our original brief.

On page 9 of the brief opposing counsel suggest that the appellants must fail because they did not introduce proof on the constitutional questions. There is, however, no requirement that constitutional questions of this character must always be decided on proof. On the contrary, most of the rulings of this Court, holding statutes unconstitutional because of arbitrary and capricious interference with the fundamental liberty guaranteed by the Fourteenth Amendment, have been made on the basis of the provisions of the statutes themselves, togther with matters that are within the judicial cognizance of the Court. It is only in relatively recent years that cases have arisen involving complicated economic or sociological backgrounds where the introduction of proof has been found necessary. No such complicated factual background is here involved, or has been suggested at any point in the argument. Solely as illustrations of rulings invalidating statutes, without requiring the introduction of proof on the points involved, we refer to:

Liggett v. *Baldridge*, 278 U. S. 105;
Meyer v. *Nebraska*, 262 U. S. 390;
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.

which are cited in our original brief to other points.

The number of such precedents could be multiplied but would serve no purpose.

Furthermore, where the statute involves a discrimination which appears arbitrary on its face the burden shifts to the side seeking to justify the discrimination to show some justification for its apparently arbitrary nature. For example, in the recent case of *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, this Court said:

> "No reasons for the discrimination are disclosed by the record; and in the absence of such showing the Court has no right to conjure up possible situations which might justify the discrimination."

The crux of the brief of opposing counsel is found on pages 11, 12, 13, and 14, in which an entirely new basis of attempted justification is set out. That basis, briefly, is that agency costs should be related to the premium charged and should be kept uniform as a means of preventing rebating. *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, is chiefly relied on in this connection. As heretofore pointed out, however, the ruling of the majority of this Court in the *O'Gorman* case was merely that excessive agency costs could be prohibited by statute as a means of keeping down insurance rates. What was said with regard to uniformity in its relation to rebating was in no sense a vital part of the decision, and if the question were actually involved in the present case we believe a strong argument could be made that the *O'Gorman* case is not authority for the position that uniform agency charges can be required as a means of preventing rebating where a State already has adequate statutes prohibiting such rebating. Georgia has such statutes. (Code § 56-218, § 56-9903).

However, the question is wholly beside the case at bar. This is, in no sense, a statute requiring uniform agency

costs. The whole argument as to the right of the State to require uniform agency costs is simply irrelevant where the statute involved does not attempt to make such a requirement, directly or indirectly. Under the Georgia statute insurance companies may pay their agents varying commissions for exactly the same services. If all agents are on a commission basis then the statute is complied with no matter how large the commissions or how much they vary for the same service. With reference to the argument of opposing counsel on this point their brief, on page 13, says: "It may be that this argument would seem more appropriate in support of legislative action fixing commissions." We agree.

On page 12, and more strongly on page 17, of the brief of opposing counsel, it is claimed that a salaried agent of an insurance company might also be licensed as a resident agent if paid on commissions for the business written as a resident agent. Just how this construction of the statute would save it is not apparent, but it plainly is an incorrect construction of the statute. The statute does provide, as opposing counsel say, that "the words 'resident agent' as used in this section are deemed to mean resident agents in the solicitation of such business from the public generally"; but the very next language in the statute is this: "and shall not include any salaried agent of any insurance company doing business in this State." The statute (p. 29, appendix to our brief) prohibits any fire or casualty company or company writing fidelity or surety bonds, from issuing any policy "except through a resident agent licensed by the insurance commissioner." Hence, no company can issue a policy except through a licensed resident agent, and no salaried employee can obtain a license as a resident agent; which necessarily reaches the result that no salaried employee can be qualified to write insurance at all. It is

not a question of how he is to be compensated for writing the insurance but is an absolute disqualification for being licensed for that purpose at all if he draws a salary.

Indeed, the present case could not have arisen at all except for this construction of the statute. The Insurance Commissioner did not refuse to issue the license because the Company did not expect to pay Francis commissions if he wrote business. No point with reference to this was raised. The Commissioner refused to issue the license because Francis, being a salaried employee, was disqualified from getting a license, and for that reason alone. The decision of the Supreme Court of Georgia necessarily recognizes the correctness of this construction of the statute.

But suppose the construction of opposing counsel were correct, it would mean about this: Assume that a branch manager, on a salary for his general services as branch manager, negotiated a certain contract of insurance; suppose he was entirely willing to do this as a part of his general work as branch manager. According to opposing counsel such branch manager could qualify as a resident agent and write the policy, provided the company paid him an extra commission for doing so, but could not qualify and write the policy unless he were given extra pay in the shape of a commission. The question then would be, whether the legislature could force the company by this statute to pay extra compensation through commissions to its salaried employee, so used, even though it and the employee were perfectly willing to contract that the service should be rendered under the general contract of employment covered by the salary. When so presented the case would fall within the principle settled by many decisions of this Court, that the legislature cannot require the payment to an adult individual, *suit juris*, and able to contract for himself, of more compensation than the amount for which he is willing to

contract with the company. *Adkins* v. *Children's Hospital*, 261 U. S. 525, and similar cases, are here in point. Indeed, the case is stronger against the constitutionality of such provision than the cases referred to, since here we are not concerned with any group suffering from economic handicaps, or with any problems connected with minimum pay for women, and the like.

And since opposing counsel are here asserting that the effect of the statute is to let insurance companies use their salaried agents, but to make them pay a commission also, then what becomes of the argument elsewhere made by opposing counsel that the purpose of the statute is to reduce agency costs? As we have heretofore pointed out, its actual operation is exactly the contrary.

On page 14 of the brief opposing counsel suggest that the statute can be sustained because insurance companies might pay unreasonable salaries which would run up agency costs. They might also pay unreasonably large commissions. There is really much more danger of commissions being unreasonably large than there is of salaries. But assuming that the legislature can prohibit unreasonably large salaries, it would nevertheless be true that the means of preventing unreasonably large salaries must be reasonable and properly adapted to that end. It is on its face unreasonable and arbitrary to prohibit any employment of any agent on any salary for the purpose of writing insurance merely because of a fear that some salary might be too large. The means adopted to correct such an evil, if there be one, from this standpoint, would be as unreasonable as to burn down a barn to get rid of a few rats.

It is also said, on page 14, that the answer avers that ninety-five per cent of insurance is written through commissioned agents or brokers, and that under the Georgia practice this specific averment of fact must be accepted.

We are entirely willing to accept it. The statute then would operate as to only the five per cent of insurance not written through ordinary brokers. It is quite obvious that this five per cent would be specially negotiated contracts covering special situations where the resident manager, or someone primarily salaried for other purposes, would act for the company. No one has ever supposed that the companies would specially employ agents on salaries whose sole business was to solicit insurance. Common knowledge of the business is to the contrary. Also, the actual insurance practice to this effect is set out in the appellee's answer (R. 9). The fact that the relevant insurance practices are set out in the appellee's answer is another reason why it was unnecessary for the appellants to introduce proof with regard thereto.

We have here, therefore, reached completely the point of actual operation of this statute. According to opposing counsel—and we accept the contention—about ninety-five per cent of insurance written would be wholly unaffected. The five per cent now ordinarily covered by policies issued by resident managers or other agents on salaries operating for other purposes, would be forcibly put over into brokers offices. The illustration given in our brief, therefore, of the operation of the statute becomes more important. This five per cent of the business, with which local insurance brokers normally have no connection, is business involving little or no agency costs to the companies. Their own salaried staffs handle it; no local broker is a producing cause of its being written. The statute, however, steps in and says that the companies are prohibited from letting their salaried representatives issue these policies even though the representatives are perfectly willing to issue them without asking any extra compensation, but as a part of their ordinary duties.

The Court will bear in mind that we have no complaint over the requirement in the statute that no one can issue such policies, whether salaried or commissioned, unless in every respect qualified in accordance with the strict requirements of the statute. Even though all of such requirements are met; even though the character, knowledge, and other tests are satisfactorily passed; exen though adequate records are kept; nevertheless, this statute prohibits any of such salaried representatives issuing policies. It forces the payment of unearned commissions on such policies to brokers who have had no connection with the transaction.

The final question in this case is whether this is a reasonable thing to do; whether it really serves anything connected with a public interest; or whether on the contrary it is merely a legislative fiat forcing the payment of unearned commissions. We believe the portion of the brief of opposing counsel to which we have referred helps us and the Court to get at the actual operation of the statute. We also believe that when we take a realistic look at what it actually does instead of conjuring up imaginary and fanciful reasons to justify it there is only one answer possible.

Counsel also say that in *LaTourette* v. *McMasters*, 248 U. S. 465, this Court said that an insurance broker was an agent for the insured as well as the insurer whose fidelity to both was a proper concern of the State. We have never denied that it is competent for the State to take reasonable means to provide that those writing insurance shall be men who will deal fairly with the insured. We do not believe the remark of the Court in the *LaTourette* case means any more than this. While that case dealt with a broker, not a salaried agent, and dealt with a statute which provided the broker should be the agent of the insured, whereas the Georgia statute says he is the agent of the insurer, nevertheless, we are willing to concede that the State can take

reasonable means to provide that only proper men, who will treat both parties fairly, may engage in writing insurance.

All of this is provided, however, in the statute, directly and adequately, as pointed out in our original brief, by requiring examination, license, etc. We have never felt that how the agent was paid had anything but a fanciful bearing on the subject, and have pursued the argument on that subject solely because counsel had made it. We have pointed out that if there was any substance to the argument it really meant that the State could by legislation undermine the loyalty of the agent to his company, although he was, under Georgia law, solely the agent of the company, and this, we said, and still say, is a shocking conclusion to reach. Apparently, however, opposing counsel have now reached the conclusion that the method of pay is not a material matter in order to secure fair treatment from an agent. On page 16 of their brief they say:

> "It can be no more said that requiring him to be compensated on a commission basis invites disloyalty to the company, than that to permit him to be compensated on a salary basis invites disloyalty to his customer."

We agree fully with this statement. The supposed connection is, and has always been, merely fanciful, but it leaves nothing of the argument of opposing counsel on this point.

On page 16 opposing counsel repeat the argument that an agent on a salary writing insurance policies is likely to be a mere clerk, who would not keep records, and say that the act does not require salaried agents to keep records. A correct statement is that the act does not require salaried agents to keep records unless they are licensed as resident agents. If they are licensed as resident agents they must keep records, and, inasmuch as they cannot write insurance at all

unless they are licensed as resident agents, it is clear that they are required by the terms of the statute to keep adequate records. It is also clear that a resident agent could not be a mere clerk unless the clerk had the knowledge, information, character, and experience necessary for him to pass the tests provided by law to qualify as a resident agent, in which event the fact that he was a mere clerk, if it were a fact, would be immaterial.

Having required the examination, and having required the keeping of adequate records, there is no possible justification for providing that no salaried agent should be licensed as a resident agent on the supposition that if the statute did not require these other things a salaried agent might not be satisfactory.

Where the legislative ends are fully accomplished by adequate and direct legislation a further restriction cannot be justified to accomplish the same ends.

See the discussion in *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, commencing at the bottom of page 414.

Respectfully submitted,

HAROLD HIRSCH,
MARION SMITH,
Attorneys for Appellants.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY AND W. M. FRANCIS,
Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

RESPONSE TO APPELLANTS' STATEMENT OF JURISDICTION.

M. J. YEOMANS,
Attorney General of Georgia;
B. D. MURPHY,
Assistant Attorney General of Georgia,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

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RESPONSE TO APPELLANTS' STATEMENT OF JURISDICTION.

Now comes the appellee and pursuant to subdivision 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, files this response to appellants' statement disclosing basis of jurisdiction of the Supreme Court of the United States and says:

Appellants' statement of the basis of jurisdiction correctly recites the stipulation of counsel filed with the Su-

preme Court of the State of Georgia that the sole question involved in the litigation is the constitutionality of the statute described in the pleadings. Appellee considers the judgment of the Supreme Court of Georgia, based upon an opinion holding the statute valid as against the constitutional objections offered, a final determination of the cause, and that a judgment of the trial court, making the judgment of the Supreme Court of Georgia the judgment of that court, would automatically deny the mandamus absolute sought by the plaintiff in the trial court.

Appellee states that the question involved in this case is one of public importance in the State of Georgia and should be finally determined without unnecessary delay. In the event it should be held that the judgment of the Supreme Court of Georgia is not a final judgment, the cause would be remanded to the superior court of Fulton county, Georgia, where the only judgment which could be entered in accordance with the decision of the Supreme Court of Georgia fixing the law of the case would be a judgment denying a mandamus absolute. Such a procedure would necessitate another judgment in the trial court, denying the mandamus absolute, and another appeal to the Supreme Court of Georgia which could only result in the same conclusion already stated by the Supreme Court of Georgia.

Respectfully submitted,

M. J. YEOMANS,
Attorney General of Georgia;
B. D. MURPHY,
Assistant Attorney General of Georgia,
Attorneys for Appellee.

I hereby certify that I have this day served the foregoing response to appellants' statement of jurisdiction by mailing copy thereof to Mr. Marion Smith, attorney for appellants.

Aug. 6, 1936.

B. D. MURPHY,
Assistant Attorney General,
Of Counsel for Appellee.

Filed in office Aug. 6, 1936. K. C. Bleckley, C. S. C. Ga.

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SUPREME COURT OF THE UNITED STATES

October Term, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER,

Appellee.

BRIEF FOR APPELLEE

M. J. YEOMANS, *Attorney General of Georgia.*
B. D. MURPHY, *Assistant Attorney General.*
Attorneys for Appellee.

[illegible] PRINTING CO., ATLANTA, GA.

SUBJECT INDEX

	Page
Statement of Case	1
Questions Involved	2
The Georgia Act Is Not Violative of the Due Process Clause	3
The Burden of Establishing the Arbitrary and Unreasonable Nature of the Statute is on the Appellant	9
The Wisdom and Expediency of the Statute are Questions Exclusively for Legislative Determination	10
The Georgia Statute Is Not Arbitrary or Unreasonable	11
Cases Cited by Appellants Distinguished	18
The Georgia Act Was Not Intended Merely to Serve the Interest of Insurance Agents	19
Equal Protection Clause	21

TABLE OF CASES CITED

Adkins v. Children's Hospital, 261 U. S. 525	18,19
Armour & Co. v. North Dakota, 240 U. S. 510	7
Atkins v. Kansas, 191 U. S. 208, 223	7
Bachtel v. Wilson, 204 U. S. 36, 41	24
Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612	7
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251	26
Bunting v. Oregon, 243 U. S. 526	7
Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 77	11
Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567	3
Franklin Fire Ins. Co. v. Montoya, 32 N. M. 88	17
Frisbie v. United States, 157 U. S. 160	6
Gant v. Oklahoma City, 289 U. S. 98	9
German Alliance Ins. Co. v. Lewis, 233 U. S. 389	4,22
Green v. Frazier, 253 U. S. 233, 240	9
Hadacheck v. Sebastian, 239 U. S. 394, 408, 414	11
Harden v. Hardy, 169 U. S. 366	7
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 158, 159	25
Hauser v. North British & Mercantile Co., 206 N. Y. 455	17
Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615	25

	Page
Hooper v. California, 155 U. S. 648, 657	15
House v. Mayes, 219 U. S. 270	7
Jacobson v. Massachusetts, 197 U. S. 11	6,7
Knoxville Iron Co. v. Harbison, 183 U. S. 13	5
LaTourette v. McMaster, 248 U. S. 465	4,15
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61	24
Louisville & N. R. Co. v. Melton, 218 U. S. 36	24
McCray v. United States, 195 U. S. 27, 55, 56	20
McLean v. Arkansas, 211 U. S. 539	6,7
Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584	9,25
Minnesota v. Barber, 136 U. S. 313, 320	7
Morehead v. Tipaldo, 56 S. Ct. 918	18
Mugler v. Kansas, 123 U. S. 623	7
Munn v. Illinois, 94 U. S. 113	6,18,25
Nebbia v. New York, 291 U. S. 502	8,10
Norfolk & Western Ry. Co. v. Public Service Comm., 265 U. S. 70	19
Northern Securities Co. v. United States, 193 U. S. 197, 337, 338	8
Northwestern National Ins. Co. v. Fishback, 130 Wash. 490	17
O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251	4,5,12,13,19
Ohio ex rel. Clarke v. Deckebach, 274 U. S. 397	25
Orient Ins. Co. v. Daggs, 172 U. S. 557	22
Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623	22,25
Patterson v. The Eudora, 190 U. S. 169	6
Radice v. New York, 264 U. S. 292	10
Rast v. Van Deman & Lewis Co., 240 U. S. 342	11,25
Schmidinger v. City of Chicago, 226 U. S. 578	7
Sproles v. Binford, 286 U. S. 374	10
Standard Oil Co. v. Marysville, 279 U. S. 582, 586	10,11,17,25,26
State Tax Comrs. v. Jackson, 283 U. S. 527, 537	25
Supreme Council Royal Arcanum v. Behrend, 247 U. S. 397	22
Tanner v. Little, 244 U. S. 369, 385	9
Weaver v. Palmer Brothers Co., 271 U. S. 402, 410	9
Westfall v. United States, 274 U. S. 256, 259	25

TABLE OF CASES CITED

	Page
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522	18
Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552	19

STATUTES CITED

	Page
Georgia Code, 1933, 56-501	11
Georgia Code, 1933, 56-508	16
Georgia Laws, 1935, p. 139	1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

W. B. HARRISON, INSURANCE COMMISSIONER OF GEORGIA,

Appellee.

No. 355

BRIEF FOR APPELLEE

STATEMENT OF CASE

The question involved is whether a Georgia statute is repugnant to the Fourteenth Amendment. The Act is published in Georgia Laws, 1935, at page 139, and is set forth in the appendix to the brief of counsel for appellants.

The challenged statute provides that fire and casualty insurance companies, and companies writing fidelity or surety bonds, shall write or issue policies on Georgia risks only through a resident agent licensed by the Insurance Commissioner of

Georgia. The statute provides that: "the words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies, however compensated." The alleged invalidity of the language just quoted is the basis for appellant's attack upon the law.

The appellant company, which had been licensed in Georgia, applied to the Insurance Commissioner of Georgia for an agent's license for its salaried employee, Francis. The Insurance Commissioner denied the license upon the sole ground that Francis was a salaried employee, raising no question as to his character or qualifications, and stating that but for the inhibition of the statute the license would be granted. Thereupon the company and Francis jointly brought a suit for mandamus against the Insurance Commissioner to require the issuance of a license to Francis. The mandamus was made absolute by the trial judge. This judgment was reversed by the Supreme Court of Georgia. The only ground upon which mandamus was sought was the alleged invalidity of the statute. The trial judge held that the statute was unconstitutional. The Supreme Court of Georgia, in an opinion written by the Chief Justice, two Justices dissenting, reversed the trial court and held the statute to be valid and enforceable.

No question is made by appellee as to the finality of the judgment of the Supreme Court of Georgia. It is conceded that the judgment of the Supreme Court of Georgia is a final determination of the case in the State courts. A stipulation of counsel filed in the Supreme Court of Georgia, while the cause was pending there on rehearing, and after a rehearing had been granted, expresses the agreement of the contending parties that the judgment of that Court should be considered a final determination of the case.

QUESTIONS INVOLVED

The record presents two questions for determination by this Court:

1. May a State, consistently with the due process of law guaranteed by the Federal Constitution, regulate the method whereby insurance companies may compensate their agents for negotiating contracts of insurance with policy holders, or is such a regulation so arbitrary and capricious as to bear no reasonable relation to any matter within the police power of the State, and amount to a deprivation of property or liberty without due process of law?

2. If a State may thus regulate the business of an insurance company, and the relations between insurance companies and insurance agents or brokers, does the Georgia Act of 1935 deny to appellants equal protection of the law because of the alleged discrimination in favor of mutual insurance companies and their agents?

THE GEORGIA ACT IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE

There can be no doubt that the Georgia Act does restrict liberty of contract on the part of both an insurance company and its agents to the extent that it prescribes, not the amount, but the method of compensation for negotiating insurance contracts.

We recognize the oft asserted principle that liberty of contract is one of the fundamental rights guaranteed by our Constitution, and that a State may not deprive a citizen of the United States of such privilege, or impair it, by the enactment of arbitrary or capricious laws. This is the extent to which the decisions of this court cited by counsel for appellants go.

We also recognize the principle, which goes hand in hand with the one just stated, that liberty of contract is not an absolute right, but is subject to reasonable regulations and prohibitions imposed in the interest of the community. *Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567.*

The difficulty in each case lies in the application of these principles. If the regulation imposed by the State bears a reasonable relation to a subject matter falling within the police power of the State, and reasonably tends to accomplish a purpose which the State may exercise its police power to

accomplish, the law will stand; otherwise, it must be condemned.

The Georgia statute here attacked relates to the business of insurance. It thus relates to a subject matter falling within the police power of the State. It may be taken as settled, as counsel for appellants concede, that the business of insurance is quasi public in its nature and character, and is so far clothed with a public interest as to make it subject to governmental regulation. *German Alliance Insurance Co. v. Lewis, 233 U. S., 389.*

We think it may also be taken as settled that because the business of insurance is affected with a public interest, those who are engaged in that business or in bringing about its consummation, are also affected with the same interest and subject to the same regulatory power of the State. *La Tourette v. McMaster, 248 U. S., 465.*

In *German Alliance Insurance Company v. Lewis*, the court held that the State of Kansas could constitutionally regulate the premium rates of insurance companies.

In *La Tourette v. McMaster*, the court held that the State of South Carolina could constitutionally limit the privilege of engaging in the business of insurance brokers to residents of that State.

In *O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S., 251*, the court held that the State of New Jersey could constitutionally regulate and limit the commissions to be paid by fire insurance companies to local agents.

In the present case the Act of the General Assembly seeks to regulate, not the amount of the agent's compensation, but the method whereby he shall be compensated. Appellants, while conceding that the State may prescribe the rates for insurance, may limit the privilege of engaging in the insurance brokerage business to residents of the State, and may prescribe the amount of compensation to be paid to insurance agents, contend that a statute regulating the method of compensation is wholly arbitrary and capricious, and that it can bear no reasonable relation to any matter falling within

the police power of the State, or reasonably tend to accomplish any purpose for which the State may exercise its police powers.

The contentions of the appellants here are substantially those made by the insurance company in *O'Gorman & Young v. Hartford Fire Insurance Co.*, supra. The principle stated by the court in that case is controlling here. We quote from the opinion of Mr. Justice Brandeis:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicate that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

In the present case appellants contented themselves in the trial court and in the Supreme Court of Georgia, and content themselves here, with a bare assertion that the statute is unreasonable and arbitrary. They offer no factual foundation for overthrowing the statute. The case falls within the rule just quoted.

There are numerous cases in which the police power of the State has been held to justify various restrictions upon the liberty of contract which the appellants here assert is protected by the Fourteenth Amendment. In *Knoxville Iron Co. v. Harbison, 183 U. S., 13,* the court found valid an act of the Legislature of Tennessee which required that store orders or other evidences of indebtedness issued by employers in payment of wages to employees should be redeemed in

cash. In *Frisbie v. United States, 157 U. S., 160,* the court sustained an Act of Congress limiting the fees of attorneys for prosecuting pension claims. In *Munn v. Illinois, 94 U. S., 113,* the court upheld an Illinois statute fixing maximum charges for the storage of grain. In *Patterson v. The Eudora, 190 U. S., 169,* an Act of Congress which prohibited a shipmaster from paying a sailor any part of his wages in advance was held to be valid.

In *McLean v. Arkansas, 211 U. S., 539,* the court upheld an Arkansas statute regulating the method whereby coal miners should be compensated for mining coal. The Act provided that where miners were employed at bushel or ton rates it should be unlawful to pass the output of coal mined by such miner over any screen or other device whereby any part of the value was removed, before the coal was weighed and credited to the employee. The contentions in that case were similar to the contentions here; that is, that the statute was an unwarranted invasion of the liberty of contract secured by the Fourteenth Amendment, and denied to the plaintiff in error equal protection of the law because of a discrimination in favor of operators employing fewer than ten men, The court quoted from *Jacobson v. Massachusetts, 197 U. S. 11,* as follows:

> "The liberty secured by the Constitution of the United States to each person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

Following this quotation, the Court said:

> "It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people.
>
> "It is also true that the police power of the State is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such

laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

"The legislature, being familiar with local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, supra; *Mugler v. Kansas, 123 U. S., 623; Minnesota v. Barber, 136 U. S. 313, 320; Atkin v. Kansas, 191 U. S. 208, 223.*

"If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

McLean v. Arkansas, supra.

Many measures which not only affected the use of private property, but limited the right of private contract, have been examined by this court and found to be consistent with due process of law. For example, a statute of Missouri regulating sales of grain by actual weight and nullifying exchange rules to the contrary, *House v. Mayes, 219 U. S. 270*; a law of North Dakota prohibiting the sale of lard otherwise than in bulk unless put up in one, three or five pound packages, net weight, or some multiple of these numbers, *Armour & Co. v. North Dakota, 240 U. S. 510*; a municipal ordinance of the City of Chicago fixing the weight of the standard loaf of bread, *Schmidinger v. City of Chicago, 226 U. S. 578*; statutes prescribing hours of labor in particular occupations have been found valid in *Harden v. Hardy, 169 U. S. 366*; *Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612*; and *Bunting v. Oregon, 243 U. S. 526.*

Finally in *Nebbia v. New York, 291 U. S. 502*, the court upheld an act of the Legislature of New York establishing a milk control board with power to fix minimum and maximum retail prices, and affirmed the conviction of Nebbia of the offense of selling milk at a price less than the minimum fixed by the Board. In that case, Mr. Justice Roberts, speaking for the majority of the court, said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adapted to its purposes. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States, 193 U. S. 197, 337, 338.* And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

See also in this connection *Tanner v. Little, 244 U. S., 369, 385; Green v. Frazier, 253 U. S., 233, 240; Gant v. Oklahoma City, 289 U. S., 98.*

THE BURDEN OF ESTABLISHING THE ARBITRARY AND UNREASONABLE NATURE OF THE STATUTE IS ON THE APPELLANT

As already stated, appellants attacked the statute as arbitrary and capricious, and as therefore depriving them of liberty of contract without due process of law, but contented themselves with the bare assertion that the statute is unreasonable and arbitrary. They set forth no factual basis for this contention.

> "It is salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it."
>
> *Metropolitan Casualty Insurance Co. v. Brownell, 294 U. S., 580, 584; Weaver v. Palmer Brothers Co., 271 U. S. 402, 410.*

No evidence was offered in the trial court by appellants, but the case was heard on the pleadings, the averments of the answer and the amendment to the answer of the appellee being taken as true. The answer and the amendment set forth certain facts which it was alleged constituted a reasonable basis for the regulations imposed by the statute, and a reasonable ground for the classification made by the General Assembly of Georgia. It was not contended by the appellee that the facts narrated in his pleadings were the only facts upon which the General Assembly may have acted in passing the law, but that the facts stated were some of the things which may have been considered by that body in the action taken.

Since neither the pleadings of the appellants, nor those of the appellee, can be taken to negative or disprove the existence of a factual basis for the statute, it cannot be said that appellants have carried the burden of establishing the want of such a factual basis, or that the statute is unreasonable and arbitrary.

THE WISDOM AND EXPEDIENCY OF THE STATUTE ARE QUESTIONS EXCLUSIVELY FOR LEGISLATIVE DETERMINATION

The subject matter of the statute here attacked, that of insurance, is one falling broadly within the police power of the State. The necessity for regulation is established by the nature and character of the business. This much is accepted by appellants. The regulations to be imposed to insure adequate protection of the public welfare in the conduct of the insurance business must of necessity be determined by the legislative body. It is for the legislature, in the exercise of that broad discretion which inherently belongs to it, to determine not only the necessity for regulation, but the means to be employed in accomplishing the purpose at which the regulations are aimed.

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment."
>
> *Sproles v. Binford, 286 U. S. 374.*

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker."
>
> *Radice v. New York, 264 U. S. 292.*

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision."
>
> *Standard Oil Company v. Marysville, 279 U. S. 582, 586.*

With the wisdom or expediency of the statute, the courts are not concerned. Those are questions exclusively for legislative determination. *Nebbia v. New York, 291 U. S. 502, 537.*

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. *Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 77; Hadacheck v. Sebastian, 239 U. S. 394, 408, 414; Rast v. Van Deman & Lewis Co., 240 U. S. 342.*"

Standard Oil Company v. Marysville, supra.

THE GEORGIA STATUTE IS NOT ARBITRARY OR UNREASONABLE

As has been stated by counsel for the appellants, the principles of law which are to be considered are well settled. The difficulty in this case, as in every case, lies in the application of those principles to the particular statute under review.

It is contended by appellants that the Georgia law bears on its face the evidence of its invalidity, when it is considered in connection with facts which may be within the judicial knowledge of the court. It is the contention of the State that the statute relates to a subject clearly within its police power, regulates the relations of those engaged in a business affected with a public interest, and cannot be said, either upon application of facts which may be known or those which may be shown, to be arbitrary or unreasonable.

It is important to note that the statute, in the respect in which it is challenged, relates only to those agents of insurance companies who are engaged in the production of business. The statute requires that policies be written or issued through resident agents, but defines resident agents as those engaged in the solicitation of insurance from the public generally. The statute does not undertake to regulate the method of compensating employees of insurance companies. It might be said with considerable force, that the method whereby an insurance company compensates its employees, such as clerks, stenographers, bookkeepers, and the like, is no concern of the State. No such question is here involved. In their brief counsel quote, at page 19, the provisions of Section 56-501 of the Georgia Code defining insurance agents. The statute under consideration does not relate to those per-

sons who may be agents within the meaning of the broad language of the Code, but only to agents engaged in selling insurance. This being true, the question narrows down to a determination of whether the State, in the exercise of its police power, may prescribe the method whereby insurance companies may compensate those agents who deal directly with the public in bringing their companies into contractual relations with policy holders.

Under the ruling of this court in *O'Gorman & Young v. Hartford Fire Insurance Company*, expenses of doing business incurred by insurance companies which bear a direct relation to the premiums charged may be regulated by the State. The compensation paid to the agent who solicits the business and brings it to the books of the company, however measured, must of necessity bear a direct relation to the rate of premium charged. This is true because the cost of obtaining business must be met before the relationship of insured and insurer comes into existence in its fullest sense. The cost of procuring business is wholly separate and apart from the expense incident to handling the business after it is obtained, and the cost of meeting losses as they occur. Thus every insurance company must first meet the cost of production out of the premium collected. Only the balance is available to pay other operating expenses, maintain reserves and meet losses. The cost of production does not affect the cost of carrying the risk. Administration expenses, profits, losses, and other expenses of carrying the risk are reflected in the premium rate, but operate to fix the premium rate only by indirection. On the other hand, the cost of production, of selling the insurance, directly affects the premium rate and actually amounts to a direct charge upon the policy holder. It may be said that this argument supports only the view that the State may regulate the amount of the commissions. We think it supports the view that the State may regulate the method of compensation. Since the expense of obtaining business amounts to a direct charge upon the policy holder, it seems to necessarily follow that the State may require that it be related to the premium charged, so that the public and the State may know how much of the premium paid by each policy holder covers the cost of writing his

policy, and how much goes to purchase the protection for which he pays.

The difficulty of relating the cost of production to the premium where agents are compensated by salaries is obvious. In such cases the compensation of the agent is arbitrarily fixed by agreement between the company and the agent, and bears no sort of relation to the amount of business which he may obtain for the company.

The power of the State to prescribe the amount of compensation which may be paid to agents negotiating insurance contracts is meaningless if the method of compensation cannot be prescribed. It would be obviously impossible for the legislature to fix the salaries of insurance agents other than upon the basis of the amount of business produced, which is but another way of limiting commissions. If it is competent for a State to prescribe the amount of compensation of an insurance agent, it seems to follow that the State may take such steps as may be necessary to enable it to effectively exercise that power. Certainly it may require that the cost of production shall be apportioned to the premium charged.

It would be manifestly impossible for the State to require or preserve any degree of uniformity in the scale of charges for the production of insurance business, if the method of compensating local agents or brokers is left entirely to the companies and their agents. Lack of uniformity in the permitted or actual charges for this class of service may, as was said by the Court in *O'Gorman & Young v. Hartford Fire Insurance Company*, *supra*, "encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating." It may be that this argument would seem more appropriate in support of legislative action fixing commissions, but it does have a bearing upon the statute now under consideration since, as already stated, the power of the State to require uniformity in the charges for this service can be preserved only by prescribing the method whereby agents are compensated. As a matter of fact, as the court judicially knows, the common practice in the operation of the business of stock insurance companies is to compensate agents on a commission basis. As is alleged by the answer, practically

all insurance written by stock companies is written on this basis. It would not be possible to require or preserve any uniform scale for compensating such agents on any other basis.

Appellants concede that the State "undoubtedly has the right to regulate insurance charges," and to that end may place a limitation against excessive agency costs. They strongly insist, however, that the power to fix the rate of compensation paid to agents marks the ultimate extent to which the police power of the State may be allowed to be extended, and that the method of compensation bears no sort of relation to any regulation of insurance charges. It seems a somewhat extreme position to say that a State may fix insurance premium rates, but may not regulate the items which directly produces the rates. The contention of appellants that the Georgia statute is not reasonably adapted to accomplishing the end of preventing excessive agency costs, presupposes that insurance companies pay and will pay only reasonable salaries to salaried employees engaged in producing business. Whether the compensation of such a salaried employee is reasonable or unreasonable, as related to the production of business, would depend entirely upon the amount of business produced by him. It thus appears that agency costs, which must necessarily directly affect the premium rates, must ultimately, in any event, be related to the business done. What the Georgia statute actually provides is that insurance companies and their agents may exercise full liberty of contract with respect to the compensation to be paid the agent for producing business, provided such compensation is measured by the business done and related to the premium charged. A statute so requiring agency costs to relate to the business produced by the agent seems clearly within the police power of the State.

The answer of the defendant (R. 9) avers that substantially ninety-five per cent of the fire and casualty insurance written on risks located in the State of Georgia by stock insurance companies is written by agents who are compensated on a commission basis. This averment of the answer is uncontradicted, and must be taken as true. The amended answer avers (R. 11) that while the agents of stock insurance companies operate under contracts with their companies, as a

matter of fact, most, if not all of them, exercise an independent business in that they solicit and write fire and casualty insurance and negotiate surety contracts without any reference to the insurance company in which the risk is to be placed; that such agents have established customers who place their insurance business with agents, leaving to the discretion of the agent the company in which the risk is to be written. These facts must also be taken as true. They establish that practically all of the insurance business of the classes dealt with in the Act is done by insurance brokers, whose business is dependent upon their maintaining the good will of their customers. The answer avers that the public is interested in insuring the fidelity of these insurance brokers to the trust imposed in them by their customers, and that it is a matter of public concern that their fidelity to this trust be insured by the method adopted by the act. Counsel for the appellants contend that the position thus asserted by appellee is shocking in that it places a premium upon disloyalty to insurance companies on the part of their agents. In *LaTourette v. McMaster*, supra, this court said:

> "And it necessarily follows that, as insurance is affected with a public interest, those engaged in it, or who bring about its consummation are affected with the same interest and subject to regulations as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer. (*Hooper v. California, 155 U. S. 648, 657*), *and his fidelity to both may be the concern of the state to secure.* As was said by the Supreme Court of the State: 'It is important for the protection of the interest of the people of the State that their business should be in the hands of competent and trustworthy persons.'" (Italics ours)

The Georgia Statute makes an insurance broker—an agent—the representative of the insurer, and by the facts stated in the answer of the appellee he is also the representative of the insured. It is the concern of the State to insure his fidelity to both, and that he be a competent and trustworthy person. In the Goergia statute the State has adopted, as a means of insuring such fidelity and trustworthiness, a provision

fixing the method of compensation so as to make the agent dependent upon both the company and the insured. It can be no more said that requiring him to be compensated on a commission basis invites disloyalty to the company, than that to permit him to be compensated on a salary basis invites disloyalty to his customer.

The answer of the appellee alleges that it is necessary for the insurance commissioner to have access to the local agents records of insurance companies in order to collect the premium tax imposed by the State, and that where a stock company follows the practice of having policies signed by a salaried employee, who in most cases is a mere clerk, the agency records are not available to him because the premium account is carried in an office or agency of the company in another State. Appellants say that this affords no reason for the challenged provision of the statute, because the statute itself requires every resident agent to keep such records as may be necessary for the collection of the premium tax. The statute does require resident agents to keep such records and furnish such information as may be required to aid the Commissioner in the collection of premium taxes, but the provision has reference only to resident agents as defined by the Act. It does not include salaried employees.

Nothing in the argument of appellants impairs the allegation of the answer that the only cases in which stock companies follow the practice of having policies signed by salaried employees are those where the contract is actually negotiated out of the State, by an agent located elsewhere, and is signed in Georgia by a mere clerk in order to technically comply with the Georgia law requiring that such policies be written or issued through a resident agent licensed by the Insurance Commissioner; and that in such cases it is impossible for the Insurance Commissioner to verify returns made for the assessment of premium taxes, because the premium account is carried in the out-of-state office. In this connection, it should be noted that the Act of 1935, in so far as it requires that fire and casualty insurance policies be written or issued through a licensed resident agent, simply reenacts an earlier act of 1925 codified as Section 56-508 of the Code of 1933. While records of premium accounts are available for inspec-

tion by the Georgia Commissioner, wherever kept, the difficulty of examining records kept in distant states is apparent. Certainly the allegations of the answer indicate the existence of conditions which had resulted in a loss of revenue to the State.

Counsel for appellants relate an assumed example of the operation of the Georgia Act of 1935, and suppose that a salaried employee of an insurance company might negotiate an agreement for a contract of insurance, and do all the things necessary to bring about its consummation, but would be required to call in an insurance broker or agent, working on a commission basis, to sign the policy, and pay such broker or agent the full normal commission on a transaction with which he had had no connection. The fact that the act may work hardships on insurance companies, or their agents, affords no reason for declaring it invalid. *Standard Oil Company v. Marysville, supra.* There is nothing in the Georgia statute which requires a licensed agent to devote his entire time to the business of writing insurance on a commission basis (C/f Hauser v. North British & Mercantile Ins. Co., 206 N. Y. 455); and nothing which limits the number of agents which a company may employ (C/f Franklin Fire Ins. Co. v. Montoya, et al., 32 N. M. 88; North Western National Ins. Co. v. Fishback, 130 Wash. 490). Consequently no such case as that supposed by appellants could exist. No question is made here as to the validity of the provision which requires payment of the full nominal commission to the agent who issues the policy. However, the language of the statute is that, "the full commission thereon (meaning thereby the commission paid for the production of business by him), shall be paid to such resident agent." Resident agents, as already stated, are defined by the act as "agents engaged in the solicitation of such business from the public generally." A person employed on a salary basis by an insurance company for some purpose other than the solicitation of business might be licensed to solicit business under the act of 1935, provided the company would compensate him on a commission basis for his services in soliciting business. There is nothing in the statute which prevents such an employee being licensed. It thus appears that the act can not be construed to require

an insurance company to pay full commissions to an agent who has no connection with procuring the business. This is manifestly true because the statute requires the payment of full commissions only to the agent producing the business.

CASES CITED BY APPELLANTS DISTINGUISHED

In the trial court and in the Supreme Court of Georgia, counsel for appellants relied upon *Adkins v. Children's Hospital, 261 U. S., 525*; *Morehead v. Tipaldo, 56 S. Ct. 918* and similar cases. The same cases are cited in the brief in this court. These cases do not relate to subjects falling within the police power of the State, or to businesses which are clothed with a public interest.

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S., 522, is not in point. There the attack was upon a statute which established a state agency to fix wages of employees in certain industries. The court held that the declaration by the legislature that a business is affected with a public interest is not conclusive of the question. The court did not determine whether the particular business should be so classified, holding that such a classification did not justify the regulations imposed by the act, which rested solely upon the avowed purpose to secure continuity of food, clothing and fuel supply. As was shown by the opinion of the court, there was no necessity for regulation of the particular industry to obtain such continuity of supply, and the purpose at which the legislation was directed and the object of the legislature were not within the police power of the State. The court quoted from *Munn v. Illinois, 94 U. S. 113*, in part as follows:

> "When, therefore, one devotes his property to a use in which the public has an interest, he in fact grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

The gist of the decision in the Wolff Packing Company case is that a State may not impose regulations for the purpose

of securing continuance of a business merely clothed with a public interest. This is not a ruling that the State may not regulate such a business so long as it is continued. Moreover, the regulations dealt with in that case had only a remote and indirect effect upon the public. Wages paid in industries are necessarily reflected in prices charged for commodities, but they are not directly related to such prices. In the insurance field, the compensation paid agents for producing business relates directly to the premium charged.

Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, is a continuance of the earlier case already referred to. What has been said with reference to the first Wolff Packing Company case also applies to the second case.

In *Norfolk & Western Railway Co. v. Public Service Commission, 265 U. S. 70,* the Court simply stated that the power of a State to regulate a public carrier does not justify unnecessary or arbitrary interference with its operation. In that case, however, the regulations challenged as arbitrary and unreasonable were upheld.

Adkins v. Children's Hospital, supra, and other cases cited by appellants, which hold that a state may not fix wages in private employment cannot have application here. Under the rule in *O'Gorman & Young v. Hartford Fire Insurance Company,* the State does have power to prescribe the rate of compensation to be paid agents of insurance companies engaged in producing insurance business.

THE GEORGIA ACT WAS NOT INTENDED MERELY TO SERVE THE INTEREST OF INSURANCE AGENTS

Appellants contend, as a last attack upon the Georgia Act, that it was obviously intended to serve those agents of insurance companies who work on a commission basis. As we have already shown, there is nothing in the statute from which such an inference can be drawn. At page 16 of their brief, counsel say that the act should have been entitled an act "to enforce the payment of full commissions to insurance brokers on business with which they have had no connection." We might, with equal logic, say that the act should have been entitled an act "to prevent the payment of ex-

orbitant salaries, wholly unrelated to the business done, to insurance agents." The idea that the act was designed to further the interest of insurance agents is founded upon no facts appearing in the record, or language used by the Georgia Legislature. There is nothing in the statute upon which such a theory can be logically based. The law already required Georgia policies to be issued by resident agents. It is alleged by the answer, and it is a fact, that substantially all of the insurance written by stock companies in Georgia is written by commissioned agents. Since there was no earlier law upon the subject, it must be assumed that the insurance companies have done business in this way because they consider it advantageous to do so. The statute does no more than require that the agent who purports to act for the company, in name, in issuing a policy, must be the agent of the company in fact. It works no greater hardship upon insurance companies than to eliminate the practice of issuing policies through mere figurehead agents who had nothing to do with the production of business. This is alleged by the answer to be the purpose for which the complaining company desired a license for its employee Francis.

The motive and purpose of the General Assembly in adopting this act may not be inquired into by the court.

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine and, on the contrary, the doctrine of a number of cases is inconsistent with its existence."
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> *McCray v. United States,*
> *195 U. S. 27, 55, 56.*

The Court is not concerned with the wisdom and propriety of the act, but with the power of the legislature to adopt it. If it is found that the legislature had such power, the statute must be upheld, even though it may appear that it is unwise legislation, or that it operates oppressively upon those who may be subject to it, or even that it affords special privileges to one class of citizens at the expense of another.

EQUAL PROTECTION CLAUSE

It is contended that the Georgia statute, even if not in violation of the due process clause of the Fourteenth Amendment, must fall because it violates the equal protection clause of that amendment in that it discriminates in favor of mutual insurance companies and their agents.

The argument of appellants apparently concedes that the radical differences between stock insurance companies, and those operating upon the mutual plan, justify classification as between such companies, but it is contended that these differences bear no relation to the method of compensating the agents of the respective classes of companies, and that therefore the Georgia act, which prescribes a method for compensating the agents of stock companies, but leaves mutual companies and their agents free to agree upon a method of compensation, is discriminatory and invalid.

The differences between stock companies and mutual companies are well recognized, and, as was said by the Supreme Court of Georgia in the present case, are radical. A contract of mutual insurance is in substance a partnership agreement whereby each insured becomes also an insurer. The mutual insurance contract is insurance in its purest form. It contemplates a distribution of the loss of a policy holder among all policy holders in proportion to the risk assumed for each. A contract of insurance between a stock insurance company and a policy holder is strictly an indemnity contract. The loss is not distributed among all policy holders, except in so far as the volume of losses may indirectly operate to fix future premium rates, but falls directly upon the company. The premium paid becomes the absolute property of the company and the policy holder has no further interest in it. In the case of mutual insurance, when the expense of administration is met and losses insured against are provided for, the remainder of the premium is returned proportionately to the policy holder in the from of dividends. A mutual insurance company has no stockholders except its policy holders; they alone own the company.

These differences between stock companies and mutual

companies have been widely recognized by statutory provisions in Georgia and other States and by decisions of this court and of various State courts. In *German Alliance Insurance Co. v. Lewis, supra*, the statute of Kansas fixing premium rates was attacked as unconstitutional upon the ground that it exempted from its operation farmers' mutual insurance companies insuring only farm property. The court said:

> "The provision of the statute is, 'That nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The distinction is therefore between cooperative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of cooperative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623.* There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Daggs, 172 U. S. 557.*"

See also in this connection *Supreme Council Royal Arcanum v. Behrend, 247 U. S. 397.*

Mutual insurance companies operate upon a basis entirely different from that of stock companies. As already stated, the mutual contract is one contemplating distribution of

losses, while the stock contract is purely one of indemnity. Mutual companies do not operate for profit, but in order to secure protection to their policy holders at the lowest possible cost. Stock companies operate strictly for the purpose of pecuniary gain to the stock holders. In the case of mutual insurance companies, as disclosed by the answer, the practice is to write policies through salaried employees, because the cost of producing business is not, as is the case with stock companies, a thing wholly separate and apart from the cost of carrying the risk, but the entire cost of operation, including the expense of producing business, maintaining reserves and meeting losses, is met out of the premiums collected, and the balance returned to the policy holders pro rata in the form of dividends. As stated, the policy holders own the company; they really carry their own risk. Since any extraordinary expense of operation may serve, not to increase premiums, but to reduce dividends, and are necessarily within the control of the policy holders, who own the company, the necessity for protection by the State against exorbitant premiums does not exist.

The amount of the compensation of the agent of a mutual company may be reflected in the premium charged, but since the premium paid by the policy holder is in fact a mere deposit out of which his proportionate share of all expenses of operation are to be met, the balance to be returned to him, the amount of the deposit is really immaterial. The policy holders, having control of the company, can relate the compensation of the agent to the business he does. Such is not the case with respect to stock companies, where the company and the policy holder deal at arm's length, and the policy holder has no voice in determining the compensation of the agent. There is no necessity for legislative action to require that the compensation of an agent of a mutual company be related to the business he does in order to protect the public who deal with such agent in entering upon contracts of mutual insurance, because the policy holder immediately becomes a part owner of the company.

As is stated in the answer, a salaried employee of a stock insurance company is interested only in the company. He is not interested in his customer, and has no incentive to pro-

tect his customer. This is not true with respect to the agent of a mutual company, because the customer immediately becomes, in a limited sense, his employer and a part owner of the company for which he works. The amount of the compensation paid persons who consummate contracts of mutual insurance is not one of public concern because the profits from the operation of the mutual company are returned to the policy holder. It makes no substantial difference to the holder of a mutual policy whether the premium rate is high or low, if ultimately all of the amount paid except the cost of carrying the risk is returned to him in the form of a dividend.

The Supreme Court of Georgia, in the present case, has held that the radical differences between mutual insurance companies and stock insurance companies form a reasonable basis for the classification made by the Georgia legislature.

It is contended by the appellants that the classification is wholly arbitrary and unreasonable. The rules by which this contention must be tested are set forth in the opinion of this court in *Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61,* as follows:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.* 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson,* 204 U. S. 36, 41; *Louisville & N. R. Co. v. Melton,*

218 U. S. 36; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 256; *Munn v. Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615." (Italics ours).

In *Metropolitan Casualty Co. v. Brownell*, *294 U. S. 580*, this court upheld an Indiana statute applicable only to insurance corporations organized in other States, which forbade them to insert in their policies certain restrictions permitted to domestic companies. The court said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast v. Van Deman & L. Co., 240 U. S. 342, 357; State Tax Comrs. v. Jackson, 283 U. S. 527, 537.* . . .
>
> "It was competent for the legislature to determine whether such differences exist, and upon the basis of those differences, and in the exercise of a legislative judgment, to make choice of the method of guarding against the evil aimed at. *Standard Oil Co. v. Marysville, 279 U. S. 582, 584; Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 158, 159.* It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a class rather than to members of it selected by more empirical methods. *Ohio ex rel. Clarke v. Deckebach, supra (274 U. S. 397); Westfall v. United States, 274 U. S. 256, 259.*"

"Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586, 587."

Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251.

We recognize the principle stated by counsel for appellants, and by the dissenting Justices of the Supreme Court of Georgia in the present case, that a mere difference is not enough to afford a reasonable basis for a legislative classification. The differences between stock insurance companies and mutual insurance companies, found by the Georgia legislature to afford a sufficient basis for classification, are not mere differences, but radical differences; they relate to the very nature and character of the contracts of the respective companies, and affect every phase of the business. Such a fundamental difference between a company contracting with a policy holder who immediately becomes a part owner of the business, and a company contracting with a policy holder with whom it deals at arm's length, and who has no voice in the management of its affairs, but an interest only to enforce his contract according to its terms in the event the contingency insured against arises, must of necessity relate to and affect every step by either party which brings about the relationship of insured and insurer.

Appellants have offered no factual basis for the declaration that the classification of the Georgia act is purely arbitrary and unreasonable; every presumption in favor of the validity of the enactment must be indulged in. In the absence of a clear showing that the classification is arbitrary and unreasonable the presumption that the legislature had before it facts which warranted the action taken must prevail.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 355.—October Term, 1936.

Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, Appellants, vs. William B. Harrison, Insurance Commissioner.	Appeal from the Supreme Court of the State of Georgia.

[May 24, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Hartford Steam Boiler Inspection and Insurance Company, a stock corporation organized under the laws of Connecticut carrying on casualty insurance business in Georgia, and its salaried employee W. M. Francis, citizen of that State, asked the ~~Supreme~~ Superior Court, Fulton County, for a mandamus requiring the Insurance Commission to license him as resident agent. The Commissioner claimed that while duly qualified in all other respects, the employee could not be so licensed because of the inhibition in Section 1, Act of the General Assembly, approved March 28, 1935. Georgia Laws, 1935, p. 140.

"No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the insurance commissioner: Provided . . . The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally, and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies, however compensated. . . ."

Appellants claimed that enforcement of the quoted inhibition would deprive them of the equal protection of the laws, contrary to the Fourteenth Amendment.

The trial court ruled "that said act, in discriminating against stock companies and the agents thereof, and in favor of mutual

companies and the agents thereof, sets up an arbitrary classification bearing no reasonable relationship to the subject-matter of the legislation, and is discriminatory, depriving both petitioner, The Hartford Steam Boiler Inspection and Insurance Company, as an insurance company, and petitioner, W. M. Francis, as an individual, of their constitutional rights." Accordingly, it directed that mandamus issue.

In the State Supreme Court counsel agreed that the sole question involved was the constitutionality of the statute. That Court, being of opinion that the Act prescribed no undue discrimination and did not otherwise conflict with the Federal Constitution, reversed the trial court. The cause is here by appeal.

The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Company* v. *Coleman, Auditor*, 277 U. S. 32, 37, 38.

"It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp.* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious

to the constitutional provision. Compare *Martin* v. *District of Columbia,* 205 U. S. 135, 139; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237."

Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Company* v. *Baldwin,* 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business. The answer of the insurance commissioner admitted that he was "entirely satisfied as to the character, standing, responsibility, ability, and knowledge" of the proposed agent, and that the license was refused solely because he was a "salaried" employee. It is plain that the requirement that the resident agents of stock companies should not work on a salary has no relation to economy or efficiency in management. The answer of the insurance commissioner states that all of the contracts of mutual fire and casualty insurance companies are "negotiated by salaried employees" and that this method of doing business was adopted "in order to reduce the expenses of operation and thus benefit the policyholders themselves."

It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employees and exclude stock companies from the same privilege. If there were any such basis, it would have been discovered by the state courts. The trial court said there was none. Two Justices of the Supreme Court were of the same opinion. The prevailing opinion in that court fails to disclose any good reason for the discrimination. The diligence of counsel for appellee has not been more successful. Thus the efforts in the state courts, and here, to find support for the statute have conspicuously failed. Statements as to the extent of the business written by stock companies are obviously beside the mark.

For the error indicated, the questioned judgment must be reversed and the cause returned to the Supreme Court for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 355.—October Term, 1936.

Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, Appellants,
vs.
William B. Harrison, Insurance Commissioner.

Appeal from the Supreme Court of the State of Georgia.

[May 24, 1937.]

Mr. Justice Roberts, dissenting.

The appellants petitioned the Superior Court of Fulton County, Georgia, for a mandamus directed to the appellee as Insurance Commissioner requiring him to issue a license to Francis, a salaried employe of the Hartford Company, as an insurance agent for the writing of casualty insurance in the State of Georgia pursuant to the Act of the General Assembly of March 28, 1935. The petition alleged that Francis possessed all the statutory qualifications for a license save only that he was a salaried employe of the insurance company and that the provision of the statute excluding salaried employes of insurance companies from licensure is unconstitutional.

Section 1 of the act of 1935[1] prohibits licensed fire or casualty insurance companies from writing or issuing any policy or indemnity contract on any risk in the state of Georgia except through a resident agent licensed by the Insurance Commissioner. The section requires the applicant for a license to be a bona fide resident of the state, of good character and competent to perform the duties of an agent. It further provides: "The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employe of any insurance company doing business in this state; but shall include any agents of mutual insurance companies however compensated."

The ground upon which the act is held invalid is that it unreasonably discriminates between salaried employes of mutual insurance companies and similar employes of stock companies.

[1] Act of March 28, 1935. Georgia Acts 1935, p. 140.

The answer alleges that there is a well recognized difference between stock and mutual insurance companies in that, in the case of the former, the relationship between the company and its policy-holders is one of contract merely, they dealing at arm's length, whereas in the latter the policy-holders are the owners of the company and constitute its membership. Other well known differences between mutual and stock insurance are detailed in the answer and will be referred to hereinafter.

The case was heard upon the petition and answer and the trial court, in the view that the act was unconstitutional, ordered that a mandamus issue. Upon appeal the Supreme Court of Georgia reversed the judgment. I am of the opinion that its decision was right and should be affirmed.

First. On its face the statute is a proper exercise of the state's police power. The provision for licensing only *bona fide* residents of the state is valid.[2] Regulation of the rates charged for insurance, of the relations of those engaged in the business and of the amount of agents' compensation fall within the exercise of this power.[3] The claim here is that the particular regulation is unreasonable and discriminatory. The presumption of constitutional validity must prevail unless the terms of the statute, or what we judicially know, or facts proved by the appellants, overthrow that presumption. As it is conceivable that conditions existed in Georgia which justified the difference in treatment of the agents of the two sorts of companies, and as no circumstances are alleged or proved or are of judicial knowledge which negative the existence of those conditions, the attack upon the statute should fail.[4]

Second. The appellant Francis asserts he is denied equal protection because agents of mutual insurance companies may be licensed even though their compensation consists of a salary rather than commissions. The answer sets up that mutual insurance companies are organized on a different basis from stock companies, do business in a wholly different way and sustain an altogether different relation to their policy-holders than do stock companies. This is matter of common knowledge. Section 56-1401 of the Georgia Code 1933 is: "The contract of insurance is sometimes upon the idea of mutuality, by which each of the insured becomes

[2] *La Tourette* v. *McMaster*, 248 U. S. 465.

[3] *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 257.

[4] *O'Gorman & Young* v. *Hartford Insurance Co.*, *supra*, 257-258; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 208, 209.

one of the insurers, thereby becoming interested in the profits and liable for the losses; without a charter, such an organization would be governed by the general law of partnership; when incorporated, they are subject to the terms of their charters." Sections 56-1401 to 56-1433 deal exclusively with the incorporation and government of mutual insurance companies setting up for them a system quite apart from that prescribed for the incorporation and regulation of stock companies. The decision law of the state also recognizes the fundamental difference between the two kinds of company.[5] The Supreme Court of Georgia quoted and relied upon its earlier decision as to the radical difference between stock and mutual companies and their methods of transacting business, and refused to hold the classification of the statute arbitrary or unreasonable.

The literature on the subject shows that at its inception the fire insurance business in the United States was modelled upon the mutual companies of Great Britain.[6] Stock companies, however, were soon organized and rapidly grew to such proportions that today they transact about seventy-five per cent of the nation's fire insurance business. Local and state mutual insurance companies now write about ten per cent of the total of fire insurance and are strongest in agricultural districts and the smaller cities; another ten per cent of the total business is written by so-called factory mutuals; the balance is cared for by Lloyd's associations.[7]

The principle of assessment upon which mutual companies proceed is practical only for carrying risks closely uniform in kind and degree, its chief advantage being low operating cost due to simplicity of organization and it is said that the sales staffs of such companies work either "on a salaried basis or on a lower scale of commissions than do the representatives of stock companies."[8] There are approximately twenty-five hundred mutual fire and casualty institutions operating throughout the United States the vast majority of which concentrate their operations locally within one or more counties or within a single state. "These companies rarely compete with agency represented stock companies and there has been no apparent inclination on their part to alter the scope

[5] *Carlton* v. *Southern Mutual Insurance Company*, 72 Ga. 371.

[6] Enc. of the Social Sciences, Vol. VI, 255; Yale Readings in Insurance, Property, Chapter IV.

[7] Enc. of the Social Sciences, Vol. VI, 258.

[8] Enc. of the Social Sciences, Vol. VIII, p. 100.

of activity or plan of operation. Of the many mutual fire insurance companies probably no more than ten per cent extend their fields of operation beyond the boundaries of their home state.'"[9]

Reference to the report of the Insurance Commissioner of Georgia for 1934, the year preceding the adoption of the statute under review, furnishes interesting data on the relative business of stock and mutual insurance companies in the state of Georgia. For that year the total of risks carried by stock fire insurance companies in the state was $1,512,181,296. Foreign mutual fire insurance companies carried only $82,727,816. Two domestic mutual companies doing a state-wide business carried $73,370,177, and fourteen small local mutuals carried $10,893,603. Thus, mutual companies carried about ten per cent of the total fire insurance business of the state and, of that ten per cent, over one-half was written by Georgia mutual companies.

While Georgia does not exclude foreign mutuals and requires them, like foreign stock companies, to register and comply with certain statutory rules in order to write business within the state, it is evident that the total mutual business written in Georgia is of minor importance when compared with the vast amount written by stock companies. This fact in itself may well be a persuasive reason for not extending to agents of mutual companies the requirement that they shall not work upon a salary.[10] When to this is added the fact that ordinarily such agents work on salary because, in effect, they are the agents of the policy-holders rather than of independent owners of a stock corporation, it is plain that there is reason for classifying them differently from agents of stock companies. In the light of the facts the classification of the agents of the two sorts of company cannot be said to be arbitrary or unreasonable, and so to deny the agents of the stock companies the equal protection of the laws.

Mr. Justice BRANDEIS, Mr. Justice STONE, and Mr. Justice CARDOZO concur in this opinion.

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[9] Best's Insurance News, October 1935, p. 314.

[10] Compare *Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 322.